



European University Institute
Department of Law

**DECENTRALISATION AND APPLICATION OF EC
COMPETITION LAW BY NATIONAL COURTS AND
ARBITRATORS.**

**THE AWAKENING OF EC PRIVATE ANTITRUST
ENFORCEMENT.**

Assimakis P. Komninos

Supervisor:
Prof. Claus-Dieter Ehlermann

Thesis submitted with a view to obtaining the degree of
Doctor of Laws of the European University Institute

B/C →



European University Institute
Department of Law

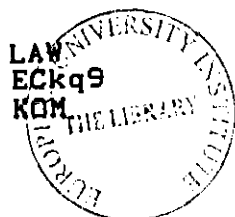
**DECENTRALISATION AND APPLICATION OF EC
COMPETITION LAW BY NATIONAL COURTS AND
ARBITRATORS**

**THE AWAKENING OF EC PRIVATE ANTITRUST
ENFORCEMENT**

Assimakis P. Komninos

Examining Board Members:

Prof. Claus-Dieter Ehlermann (Supervisor, European University Institute)
Prof. Laurence Idot (Ext. co-supervisor, Université Paris I Panthéon-Sorbonne)
Sir Francis Jacobs (King's College London)
Prof. Christian Joerges (European University Institute)



Florence, September 2006

TABLE OF CONTENTS

Abbreviations

Introduction

A. EC PRIVATE ANTITRUST ENFORCEMENT

1. A Delimitation of EC Private Antitrust Enforcement: Definitions and Modalities
 - a. Definition
 - b. The Modalities of EC Private Antitrust Enforcement
2. Public and Private Antitrust Enforcement and the Objectives of EC Competition Law
 - a. Enforcement Objectives
 - b. The Complementarity between Public and Private Antitrust Enforcement
 - c. The Relevance of the Goals of EC Competition Law
3. The Independence of Private Antitrust Enforcement
 - a. Independence as Principle
 - b. The Commission Green Paper and National Competition Laws on the Independence of Private Enforcement
 - c. Practical Problems in the Interrelationship between Public and Private Enforcement: Settlements, Leniency, Amount of Fines and Damages

B. THE INSTITUTIONAL LAW ASPECTS OF THE APPLICATION OF EC COMPETITION LAW BY NATIONAL COURTS

1. The Old Administrative Authorisation and Notification System
 - a. The “Foundational” Public Enforcement System
 - b. Competence of Civil Courts to Apply Articles 81(1),(2) and 82 EC
 - c. Competence of Civil Courts to Apply Article 81(3) EC
 - d. The Case of Block Exemptions
 - e. The Case of Comfort Letters
 - f. Competence of Civil Courts in Merger Cases?
2. The Advent of Modernisation and the Passage to a Legal Exception System
 - a. The 1999 White Paper and the Reasons that Lay behind it
 - b. Modernisation and Decentralisation between Substance and Procedure
 - c. The “Legal and Cultural Revolution” of the 1999 White Paper
 - aa. Is Subsidiarity Relevant?
 - bb. The Compatibility of the New System with the Treaty
 - cc. Efficiency of Competition Law Enforcement under the New System
 - dd. Consistency and Coherence of the New Enforcement System
 - ee. Legal Certainty in the New Enforcement System
 - d. The New Regulation 1/2003
3. The Pillars of the New Decentralised System of EC Competition Law Enforcement: “Centralised Decentralisation”?
 - a. Strengthening the Supremacy of Community over National Competition Law
 - aa. The Confirmation of the Broad Nature of the Effect on Trade among Member States
 - bb. The Relationship between National and Community Competition law – The Pre-existing Unsatisfactory State of the Law
 - cc. The Relationship between National and Community Competition law – The Supremacy Rule of Article 3 of Regulation 1/2003

- b. The New Institutional Position of National Competition Authorities and the European Competition Network
 - aa. The Powers of NCAs under the New System
 - bb. Co-operation Mechanisms within the European Competition Network
 - cc. Allocation of Cases and Exchange of Information
- c. The New Institutional Position of Civil Courts
 - aa. The Powers of National Courts under the New System
 - bb. Co-operation Mechanisms between the Commission and National Courts
 - cc. The Right of National Courts to Seek the Commission's Assistance
 - dd. Information Exchange between the Commission and National Courts
 - ee. The Duty of Member States to Transmit Copies of Judgments to the Commission
 - ff. The *Amicus Curiae* Mechanism
 - gg. Other Indirect Co-operation Mechanisms or Support for National Courts
- d. Strengthening the Supremacy of Community over National Proceedings
 - aa. *Masterfoods* and Article 16 of Regulation 1/2003
 - bb. The Scope of the Supremacy Rule of *Masterfoods* and Article 16 of Regulation 1/2003
 - cc. The Concept of "Conflict" between Commission Administrative Proceedings and National Civil Proceedings
 - dd. Resolution of Conflicts
 - i. First Scenario: Pending National Court Proceedings and Envisaged or Final Commission Decision
 - ii. Second Scenario: Non-final National Court Judgment and Envisaged Commission Decision
 - iii. Third Scenario: Final National Court Judgment Finding Inapplicable the Competition Rules and Envisaged Applicability Commission Decision
 - iv. Fourth Scenario: Final National Court Judgment Finding a Violation of the Competition Rules and Envisaged Inapplicability Commission Decision
 - v. Fifth Scenario: The Special Case of Commission Commitment Decisions under Article 9 of Regulation 1/2003

C. THE SUBSTANTIVE AND PROCEDURAL LAW ASPECTS OF EC PRIVATE ANTITRUST ENFORCEMENT

- 1. Moving from a Decentralised System to a System of Private Enforcement
 - a. Decentralisation: A Necessary but Insufficient Tool to Promote Private Enforcement
 - b. EC Private Antitrust Enforcement Between National and Community Law
- 2. The Substantive Law Framework
 - a. Nullity
 - aa. Nullity of Anti-Competitive Agreements under Article 81(2) EC
 - bb. The Nature of the Article 81(2) EC Nullity
 - cc. The Legal Consequences of Nullity: Severance and Related Contracts
 - dd. Nullity under Article 82 EC
 - b. Damages
 - aa. From Inexistence to the Awakening of EC Private Enforcement
 - bb. The Brussels Way to *Courage*

- cc. The Luxembourg Way to *Courage*
- dd. *Courage v. Crehan*: The Celebration of a Community Right to Damages
- ee. *Courage* Seen between Community and National Law
- ff. *Manfredi*
- gg. *Excursus*: The Importance of *Courage* for Community Law in General
- hh. Post-*Courage* Developments: The Commission Green Paper on Damages
- ii. Post-*Courage* Developments: National Level
- kk. The Conditions of Civil Liability
 - i. Standing
 - ii. Fault
 - iii. Defences
 - iv. Passing-on Defence
 - v. Standing of Indirect Purchasers and Consumers
 - vi. Nature of Harm and Causation
 - vii. Nature and Measure of Damages
- c. Injunctions
- d. Restitution and Declaratory Actions
- 2. The Procedural Law Framework
 - a. National Procedural Divergences and the Challenge for an Effective System of EC Private Enforcement
 - b. The *ex officio* Application of EC Competition Law
 - c. Rules of Evidence
 - d. Collective and Representative Claims
 - e. Other Procedural Questions

D. ARBITRATION AND EC COMPETITION LAW

- 1. Arbitration and Community Competition Law: Contradiction and Complementarity
- 2. The Relationship between EC Competition Law and Arbitration: A Developmental Perspective
 - a. Introduction
 - b. Conflict and Distrust
 - aa. Arbitration Clauses/Agreements as Anti-competitive Agreements
 - i. The Parallel of Settlements
 - ii. The Independence of the Arbitration Clause/Agreement
 - iii. Arbitration Clauses/Agreements that Are by Themselves Anti-competitive
 - bb. Arbitral Awards as Anti-competitive Agreements?
 - cc. Duty to Notify Arbitral Awards in Individual Exemption Decisions
 - dd. Duty to Notify Arbitral Awards in Block Exemption Regulations
 - c. Embrace and Complementarity
 - aa. The More General Positive Approach for Arbitration and ADR in Community Law
 - bb. The Beginning of the Commission's (Awkward) Embrace of Arbitration: The Motor Vehicles Block Exemption Regulation
 - cc. *Falling in Love*: Arbitration in Merger Clearance Decisions
 - i. The Commission's Practice in Accepting Commitments in Merger Clearance Cases
 - ii. Examples of Merger Clearance Decisions Referring to or Imposing Arbitration

- iii. Spill-over to the National Level
 - dd. Arbitration in Article 81(3) EC Individual Exemption Decisions
 - ee. Arbitration in Informal Settlements in Article 81 and 82 EC Cases
 - ff. Arbitration in Commitment Decisions of Article 9 of Regulation 1/2003
 - gg. Arbitration as an Imposed Remedy in a Commission Infringement Decision?
 - hh. A Critical Evaluation of the Nature and Function of Arbitration in Merger and Other Cases
 - i. Evaluation from the Community Law Standpoint
 - ii. Evaluation from the Arbitration Standpoint
 - iii. Enforcement of Arbitration Commitments
 - iv. Lessons from the Limited Practice of "Regulatory Arbitration"
- 3. The Power of Arbitrators to Apply EC Competition Law
 - a. Arbitrability of EC Competition Law
 - b. Competences of Arbitrators in the Decentralised System of Enforcement
 - aa. Modalities of EC Competition Law Issues Arising in Arbitration
 - bb. The Full Power of Arbitrators to Apply Article 81(3) EC
- 4. The Institutional Position of Arbitration in EC Competition Law Enforcement
 - a. Arbitration and European Court of Justice
 - aa. Direct Preliminary References: The *Nordsee* Obstacle
 - bb. A Tempering of *Nordsee*?
 - cc. Indirect Preliminary References through National Courts
 - i. Existing Possible Mechanisms
 - ii. Finding Other Creative Solutions
 - b. Arbitration and European Commission
 - aa. Arbitration and Regulation 1/2003
 - bb. The Commission's Ignorance of Arbitration in the Co-operation Notice
 - cc. The Special Case of Non-EU-based Arbitral Tribunals
 - c. Arbitration and Member States Courts
- 5. Conflicts of Resolution and the *ultimum refugium* of the Public Policy Nature of EC Competition Law
 - a. Resolution of Conflicts
 - aa. Scenarios of Conflict
 - bb. Direct Intervention by the Commission against Arbitral Proceedings and Awards
 - b. The *ultimum refugium* of the Public Policy Nature of EC Competition Law
 - aa. The Notion of Public Policy
 - bb. *Eco Swiss*
 - cc. The Public Policy Nature of the Community Rules on Competition
 - dd. The Scope of Public Policy Violation
 - ec. The Parallel of the Brussels Convention
 - ff. The National Prodigy of *Eco Swiss*
 - gg. Arbitrators' "Duty" to Apply EC Competition Law
 - hh. Conclusion

Bibliography

Abbreviations

ADRLJ	<i>The Arbitration and Dispute Resolution Law Journal</i>
AG	Advocate-General
AG	<i>Die Aktiengesellschaft, Zeitschrift für das gesamte Aktienwesen, für deutsches, europäisches und internationales Unternehmens- und Kapitalmarktrecht</i>
Am.JComp.L	<i>American Journal of Comparative Law</i>
Am.Rev.Int'l Arb.	<i>American Review of International Arbitration</i>
Antitrust Bull.	<i>The Antitrust Bulletin</i>
Antitrust LJ	<i>Antitrust Law Journal</i>
Arb.	<i>Arbitration, The Journal of the Chartered Institute of Arbitrators</i>
Arb.Int'l	<i>Arbitration International</i>
AWD	<i>Außenwirtschaftsdienst des Betriebs-Beraters</i>
BB	<i>Der Betriebs-Berater</i>
BCInt'lComp.LRev.	<i>Boston College International and Comparative Law Review</i>
Berkeley JInt'lL	<i>Berkeley Journal of International Law</i>
Bull. ASA	<i>Bulletin de l'Association Suisse de l'Arbitrage</i>
CA	Court of Appeals (England)
Case WRes.JInt'lL	<i>Case Western Reserve Journal of International Law</i>
CAT	Competition Appeal Tribunal (UK)
CDE	<i>Cahiers de Droit Européen</i>
Ch.D	Chancery Division (England)
CLJ	<i>Cambridge Law Journal</i>
CMLR	Common Market Law Reports
CMLRev.	<i>Common Market Law Review</i>
Columbia JEL	<i>Columbia Journal of European Law</i>
Columbia JTransnat'lL	<i>Columbia Journal of Transnational Law</i>
Com.Ct.	Commercial Court of Queen's Bench Division (England)
Comp.LJ	<i>Competition Law Journal</i>
Contr. & Impr.	<i>Contratto e Impresa</i>
Contr. & Impr. (Eur.)	<i>Contratto e Impresa, Europa</i>
Contr.Conc.Consomm.	<i>Contrats-Concurrence-Consommation</i>
CYELS	<i>Cambridge Yearbook of European Legal Studies</i>
D.	<i>Recueil Dalloz</i>
D.S.	<i>Recueil Dalloz (Sirey)</i>
Dir.Com.	<i>Diritto Comunitario e degli Scambi Internazionali</i>
Dir.Comm.Int.	<i>Diritto del Commercio Internazionale</i>
Dir.Pubbl.Comp.Eur.	<i>Diritto Pubblico Comparato ed Europeo</i>
Dir.Un.Eur.	<i>Il Diritto dell'Unione Europea</i>
DÖV	<i>Die Öffentliche Verwaltung, Zeitschrift für öffentliches Recht und Verwaltungswissenschaft</i>
EBLR	<i>European Business Law Review</i>
EBOR	<i>European Business Organization Law Review</i>
EC	European Community
ECC	European Commercial Cases
ECJ	<i>European Competition Journal</i>
ECJ	European Court of Justice
ECLR	<i>European Competition Law Review</i>

ECR	European Court Reports
Edin.LRev.	<i>The Edinburgh Law Review</i>
EEA	European Economic Area
EEC	European Economic Community
EIPR	<i>European Intellectual Property Review</i>
ELRev.	<i>European Law Review</i>
EPL	<i>European Public Law</i>
ERPL	<i>European Review of Private Law</i>
EU	European Union
EUI	European University Institute
Eu.LR	European Law Reports
Eur. & Dir.Priv.	<i>Europa e Diritto Privato</i>
EuR	<i>Europarecht</i>
Euro.CL	<i>European Current Law</i>
EuZW	<i>Europäisches Zeitschrift für Wirtschaftsrecht</i>
EWS	<i>Europäisches Wirtschafts und Steuerrecht, Betriebs-Berater für Europarecht</i>
Fordham Int'l LJ	<i>Fordham International Law Journal</i>
GCLC	Global Competition Law Centre
Giurispr.It.	<i>Giurisprudenza Italiana</i>
Giurispr.Comm.	<i>Giurisprudenza Commerciale</i>
Giust.Civ.	<i>Giustizia Civile, Rivista Mensile di Giurisprudenza</i>
GJ	<i>Gaceta Jurídica de la Unión Europea y de la Competencia</i>
GP	<i>Gazette du Palais</i>
GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i>
GRUR Int.	<i>Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil</i>
ICC / CCI	International Chamber of Commerce / Chambre de Commerce Internationale
ICC Bull.	<i>The ICC International Court of Arbitration Bulletin</i>
ICCA	International Council for Commercial Arbitration
ICCLR	<i>International Company and Commercial Law Review</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID Rev.	<i>ICSID Review, Foreign Investment Law Journal</i>
IIC	<i>International Review of Industrial Property and Copyright Law</i>
IJEL	<i>Irish Journal of European Law</i>
ILA	International Law Association
Int.ALJ	<i>International Arbitration Law Review</i>
JIntell.PL&P	<i>Journal of Intellectual Property Law & Practice</i>
Intereconomics	<i>Intereconomics, Review of European Economic Policy</i>
Int'l Lis	<i>Il Corriere Giuridico, Supplemento di Documentazione e Discussione sul Diritto Giudiziario Transnazionale</i>
Int.TLR	<i>International Trade Law and Regulation</i>
IPRax	<i>Praxis der internationalen Privat- und Verfahrensrecht</i>
JBl	<i>Juristische Blätter</i>
JCP	<i>La Semaine Juridique, Jurisclasseur Périodique, Édition Générale</i>
JDI (Chunet)	<i>Journal du Droit International (Chunet)</i>
JdT	<i>Journal des Tribunaux, Hebdomadaire Judiciaire</i>

JdT (Eur.)	<i>Journal des Tribunaux, Droit Européen</i>
JInt'l Arb.	<i>Journal of International Arbitration</i>
JPIL	<i>Journal of Private International Law</i>
JPS	<i>Jahrbuch für die Praxis der Schiedsgerichtsbarkeit</i>
JuS	<i>Juristische Schulung</i>
JZ	<i>Juristen Zeitung</i>
Law&Pol'y Int'l Bus.	<i>Law and Policy in International Business</i>
LIEI	<i>Legal Issues of European Integration</i>
LIDC	<i>Ligue Internationale du Droit de la Concurrence</i>
LS	<i>Legal Studies</i>
Merc.Conc.Reg.	<i>Mercato, Concorrenza, Regole</i>
Mich.LRev.	<i>Michigan Law Review</i>
MLR	<i>Modern Law Review</i>
NILQ	<i>Northern Ireland Legal Quarterly</i>
NJW	<i>Neue Juristische Wochenschrift</i>
Nw.JInt'l L&Bus.	<i>Northwestern Journal of International Law and Business</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
PL	<i>Public Law</i>
QB	<i>Queen's Bench Division (England)</i>
RabelsZ	<i>Rabels Zeitschrift für Ausländisches und Internationales Privatrecht</i>
RAE / LEA	<i>Revue des Affaires Européennes / Law and European Affairs</i>
RDAl / IBLJ	<i>Revue de Droit des Affaires Internationales/International Business Law Journal</i>
RDIDC	<i>Revue de Droit International et de Droit Comparé</i>
RDUE	<i>Revue du Droit de l'Union Européenne</i>
Rec.Cours	<i>Recueil des Cours de L'Académie de Droit International de La Haye</i>
Rev.Arb.	<i>Revue de L'Arbitrage</i>
Rev.Conc.Consomm.	<i>Revue de la Concurrence et de la Consommation, Droit et Marchés</i>
Rev.Suisse DIC	<i>Revue Suisse du Droit International de la Concurrence</i>
RHDE	<i>Revue Hellénique de Droit Européen</i>
RHDI	<i>Revue Hellénique de Droit International</i>
RIDE	<i>Revue Internationale de Droit Économique</i>
Riv.Dir.Comm.	<i>Rivista di Diritto Commerciale</i>
Riv.Dir.Eur.	<i>Rivista di Diritto Europeo</i>
Riv.Dir.Ind.	<i>Rivista di Diritto Industriale</i>
Riv.Dir.Int.Priv.Proc.	<i>Rivista di Diritto Internazionale Privato e Processuale</i>
Riv.It.Dir.Pubbl.Com.	<i>Rivista Italiana di Diritto Pubblico Comunitario</i>
RIW	<i>Recht der Internationalen Wirtschaft</i>
RLC	<i>Revue Lamy de la Concurrence, Droit-Économie-Régulation</i>
RTDComm.	<i>Revue Trimestrielle de Droit Commercial et de Droit Économique</i>
RSC	<i>Robert Schuman Centre, European University Institute</i>
RTDE	<i>Revue Trimestrielle de Droit Européen</i>
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren / German Arbitration Journal</i>
TEU	<i>Treaty on European Union</i>
Tex.Int'l LJ	<i>Texas International Law Journal</i>
Tul.Eur.Civ.LForum	<i>Tulane European & Civil Law Forum</i>

UNCITRAL	United Nations Commission on International Trade Law
Vand.JTransnat'lL	<i>Vanderbilt Journal of Transnational Law</i>
WBI	<i>Wirtschaftsrechtliche Blätter, Zeitschrift für österreiches und europäisches Wirtschaftsrecht</i>
WRP	<i>Wettbewerb in Recht und Praxis</i>
WuW	<i>Wirtschaft und Wettbewerb</i>
YCA	<i>Yearbook of Commercial Arbitration</i>
YEL	<i>Yearbook of European Law</i>
ZEuP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZfRV	<i>Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht</i>
ZHR	<i>Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht</i>
ZVgl.RWiss.	<i>Zeitschrift für die vergleichende Rechtswissenschaft</i>
ZWeR	<i>Zeitschrift für Wettbewerbsrecht</i>
ZZPInt.	<i>Zeitschrift für Zivilprozeßrecht International</i>

Introduction

This study is an attempt to speak about the awakening of private antitrust enforcement in Europe, especially in the context of the recent modernisation and decentralisation of EC competition law enforcement. In particular, we examine the role of courts in the application of the EC competition rules and view that role in the broader system of antitrust enforcement. At the same time, since competition law in Europe is also *Community* law, we also view private enforcement from the point of view of general Community law and its effectiveness.

The application of EC competition law by civil courts, though not particularly developed, has not been a recent phenomenon. Indeed, the very first preliminary reference made by a national court to Luxembourg under the old Article 177 EEC was a competition case where EC competition law arose in the context of private litigation.¹ Of course, the mere *application* of the competition rules by national courts cannot be said to amount to a system of private antitrust *enforcement*. The very term “enforcement” signifies an instrumental role of private actions in the sense that the private litigants become themselves actors in enhancing the overall efficiency and effectiveness of the competition enforcement system. It is only very recently that private antitrust enforcement appears for the first time as a real enforcement mechanism and thus as a meaningful complement to public enforcement. This has come as a consequence of the modernisation and decentralisation reforms that have produced a new enforcement system for the 21st century. But it has also come as a consequence of ground-breaking rulings by the Court of Justice, which has extended the scope of remedies available to individuals by Community law to cover also individual civil liability.

Modernisation and the advent of Regulation 1/2003 did not themselves energise private enforcement but rather offered the appropriate impetus and overall conditions for the matter to be addressed both at the Community and national levels. What in 1999 seemed distant and utopic, in 2006 appears a reality that private firms, public authorities and the legal profession will have to take seriously into account. The publication in December 2005 of the Green Paper on damages actions by the European Commission concludes a long period of reflection and announces a new stage of development for private antitrust enforcement that is currently difficult to predict.

¹ Case 13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, [1962] ECR 45.

This study also has the ambition to view in this context the case of arbitration. Arbitration presents itself as a form of private justice, alternative to state justice, and its functions and ambitions with reference to the application of EC competition law are not different to those of state courts. Indeed, arbitrators constitute the “natural judge” of most business disputes, especially in the international context and as such they are certainly heavily implicated in any discourse of private antitrust enforcement.² It would be of course an overstatement to speak of arbitration as a forum of private antitrust *enforcement*. Indeed, arbitrators do nothing more than to resolve disputes before them and, especially in the context of international commercial arbitration, have no forum and do not purport to serve any particular national or supranational public interest. However, this does not mean that arbitrators are immune from competition law in the exercise of their functions. On the contrary, in the last twenty years a new balance has taken form in the relationship between arbitration and competition law, built more on common interest, mutual respect, persuasiveness and pragmatic deference than on conflicts and hard law duties. As a result, the institution of arbitration is strengthened and the array of matters that can be submitted to arbitration is broadened. At the same time, the arbitrators assume greater responsibilities in areas affected by the competition rules and this serves in an indirect yet undeniable manner the overall effectiveness and respectability of the EC competition rules themselves.

² See L. Idot, *Droit communautaire de la concurrence, Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Paris/Brussels, 2004), p. 81.

A. EC PRIVATE ANTITRUST ENFORCEMENT

1. A Delimitation of EC Private Antitrust Enforcement: Definitions and Modalities

a. Definition

A preliminary question is to *define private enforcement*. If private enforcement were to be given a rather broad meaning, i.e., if it meant enforcement of the EC antitrust rules through the initiative or intervention of private parties, then one could argue that such a definition seems to cover cases of private parties acting also as complainants to competition enforcement agencies. This has been termed as “privately triggered public enforcement”.³ Indeed, if the criterion is so general, the conclusion is that already there is a developed system of private enforcement at the central level of EC competition law enforcement, i.e. at the Commission level. Complainants in EC competition cases, as a result more of the Community Courts’ jurisprudence than of EC legislation, enjoy a rather elaborately defined legal status and are also accepted as players in the antitrust enforcement. However, this is not how private antitrust enforcement should be conceived.

Therefore, that concept can be further delimited: Any private parties involved in the enforcement of antitrust rules must do so as litigants in a litigation as against the perceived offenders of those rules. However, even so, such delimitation would not avoid including cases, where private parties participate in an already on-going litigation, which takes place primarily between an administrative authority and a defendant. In such cases private parties may join such litigation as interveners, if they can prove a direct and legitimate interest. This could be the case at the Community level, e.g. a third party intervention at the Community Courts level, or at the national level depending on national procedural rules, e.g. a third party intervention in review proceedings following a decision of a national antitrust authority. Such intervention cannot make this litigation private antitrust enforcement. The characteristic element of the latter is that it leads to some sort of civil sanction as against the offender: damages, restitution, injunctions, voidness of a contractual relationship, non-invocability of certain claims based for example on contract or on unfair competition law.⁴ Therefore, the mere intervention of a private party in a public

³ See Komninos, “Introduction”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. xxiii.

⁴ The European Commission appears now to accept these forms of civil litigation as “private enforcement”, although it has so far concentrated only on energising damages actions. See Commission MEMO/05/489, *European Commission Green Paper on Damages for Breach of EC Treaty Antitrust Rules – Frequently Asked*

enforcement litigation, does not turn the latter into a private enforcement one, although such intervention may be beneficial to the effectiveness of *public* enforcement (for example because of the pooling of public and private resources in the detection of a cartel).⁵

As a consequence, a more appropriate definition of private enforcement would refer to *a litigation, in which private parties advance independent civil claims or counter-claims based on the EC competition provisions*. Such a definition would basically cover civil litigation, but it would be broad enough to encompass third party civil claims attached to civil and/or administrative public enforcement proceedings. This is not affected by the fact that a national antitrust authority, or, indeed, the EC Commission may intervene as *amicus curiae* in civil proceedings between private parties. The litigation in such cases will retain basically the characteristics of private enforcement, but with some additional elements of public enforcement.⁶

b. The Modalities of EC Private Antitrust Enforcement

In order to proceed to the specifics of private antitrust enforcement one must also first examine the modalities of the application of EC competition law by civil courts.

A first differentiation can be made between *shield* and *sword* litigation. EC competition law may be pleaded in a civil litigation as a *shield*. This might be so in contractual liability cases, where the plaintiff claims specific performance of the contract or alleges its breach by the defendant

Questions, accompanying the Green Paper on damages actions, under the title "What does the Green Paper deal with?"

⁵ Even such intervention in public enforcement cases may be relevant for private enforcement, when the latter follows in time and relies on the former, if for example facts established in a public enforcement litigation are used by the parties in a subsequent civil litigation.

⁶ Note that the Commission has never proceeded in such categorisations either as to private antitrust enforcement as such or as to the role of courts. This may create some confusion, since national courts may be assigned different roles in the Member States (sometimes difficult to distinguish) and there are, indeed, various instances in which the proceedings even before a national *civil* court cannot be said to constitute "private enforcement". See Recital 21 of the new Reg. 1/2003 (cited below), where reference is made to "courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts", and para. 2 of the Notice on co-operation between the Commission and national courts (cited below), using similar terminology. This insistence on the organic rather than on the functional criterion has been criticised as confusing, since it fails to distinguish among the different functions of courts (see Idot, *supra* (2004c), p. 80; Blaise and Idot, "Chronique concurrence (1er janvier 2002 - 31 mars 2003) : Règlement 1/2003 du 16 décembre 2002", 39 RTDE 287 (2003), p. 331; Idot, "2004: L'an 1 du nouveau droit de la concurrence?", (2004-1) *Europe* 3, p. 4); Schurmans, "Le rôle du juge dans la mise en œuvre du droit européen de la concurrence", in: Nihoul (Ed.), *La décentralisation de l'application du droit de la concurrence, Un rôle accru pour le praticien?* (Bruxelles/Louvain-la-Neuve, 2004), p. 93. On another occasion, we have stressed that the terms "authority" and "court" used in the new Reg. 1/2003 (e.g. Arts. 5, 6, 15, 35) should be treated independently of the terms "court" or "tribunal" used in Art. 234 EC. See further Komninos, "Article 234 EC and National Competition Authorities in the Era of Decentralisation", 29 ELRev. 106 (2004), p. 112.

and claims damages, while the latter raises the nullity of the contract or of parts thereof.⁷ Another instance is unfair competition actions against “free riders”, when EC competition law is pleaded in defence. These kinds of civil litigation (“shield litigation”) cannot directly account for active private enforcement of competition law, although litigation tactics may in certain circumstances elevate shield litigation to a very powerful and pro-active instrument in competition law enforcement.⁸ Thus, prospective plaintiffs, instead of filing a suit themselves against a monopolist that excludes them from the market through foreclosure, may decide to encourage the monopolist’s contracting parties to breach their contracts and agree to support and indemnify them in case of an action brought by the monopolist. In this case the competition provisions will be pleaded as a defence by the defendants, though in essence the whole mechanism will have been instigated by a third party in a pro-active way.

Cases where competition law, in particular Article 81(2) EC, has been raised as a shield by defendants have been numerous before national courts. Their contribution towards the development of a more effective system of private enforcement varies from very significant to minimal.⁹ In most cases the competition rules are not invoked by the victim of a restraint but by participants therein. They are pleaded not because and whenever competition is endangered, but only incidentally. In addition, they are often applied when competition has already been harmed and the compensatory and deterrent function of such litigation is minimal.¹⁰

There is no doubt that from a private enforcement perspective, more significant are the cases, where competition law is pleaded as a *sword*.¹¹ Usually one party puts forward a claim for injunction, damages, restitution or interim measures that intends to compensate and/or to put an end to the harm caused by the infringement of the EC competition rules.¹² While injunctions (usually of an interlocutory nature) are often granted by EU Member State courts, damages

⁷ In reality the situation will be a bit more complicated, since the plaintiff will most likely counter-plead the compensating qualities of the agreement that make it lawful under Art. 81(3) EC.

⁸ The Commission considers such cases as falling into “private enforcement”. See *Commission XXVIIth Report on Competition Policy – 2004* (Brussels/Luxembourg, 2005), para. 114, which refers to the national judgments that were communicated by Member States pursuant to Art. 15(2) Reg. 1/2003 (see *infra*): “The overwhelming majority of those judgments (29) resulted from private enforcement action, in most cases aimed at the annulment of an agreement on the ground of its incompatibility with the EU competition rules”.

⁹ See Basedow, “Panel One Discussion: Substantive Remedies”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 32.

¹⁰ See Jacobs and Deisenhofer, “Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 190.

¹¹ See also Baudenbacher, “Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions”, in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 441.

¹² Another possibility is to file an action for the declaration of the nullity of anti-competitive agreement (*action en nullité*). This type of actions is rare in practice.

claims have been rare in Europe as opposed to the US. Yet, damages awards are thought of as the most important limb of private antitrust enforcement.

A second differentiation can be made between litigation, where EC competition law constitutes the main or the subsidiary issue (*à titre principal* and *à titre incident*). This categorisation found favour quite early in theory and practice, although, as we argue, it is not successful and, indeed, it has lately been abandoned. EC competition law is applied as the main or principal issue of the dispute (*à titre principal*) usually before specialised courts (competition tribunals), that are entrusted with the application of national and Community competition rules in a given EU Member State,¹³ or before ordinary - administrative or civil - courts exercising a judicial review over decisions of national competition authorities.¹⁴ However, EC competition law may be the *main* issue even of a *civil* proceeding before an ordinary *civil* court.¹⁵ Thus, in legal systems recognising the possibility of declaratory actions,¹⁶ the main issue of the litigation is the applicability or non-applicability of the competition provisions and not the civil consequences thereof. These declaratory actions may be, indeed, preferable on occasions by market players, if the latter only intend to use the courts' substantive law findings that enjoy *res judicata* effect, instead of pursuing civil sanctions. Such may be an action by a distributor against two suppliers when the former requests the court to declare the illegality of a market-sharing arrangement between the latter, in view of its violation of Article 81 EC.

Secondly, the EC competition rules may constitute a *subsidiary* or *preliminary* issue in a civil proceeding before a civil court. This is so in the vast majority of cases. Thus, where competition law is pleaded as a shield, in order for a civil court or arbitrator to examine the validity or nullity of an agreement and its legal consequences (main issue), it has to deal with

¹³ Such is e.g. the case of the United Kingdom (CAT - Competition Appeals Tribunal).

¹⁴ E.g. in Greece and in Italy judicial review of the national competition authorities' decisions has been entrusted to the administrative courts, while in France and in Germany judicial review is exercised by civil courts.

¹⁵ See Ioannou, "The National Judge and Community Competition Law", 4 RHDE 423 (1984) [in Greek], p. 431.

¹⁶ In some continental legal systems civil actions are classified, based on the form of judicial relief sought, into actions for performance, declaratory and constitutive actions. The first, which are most often, require the defendant to specifically perform an obligation or to pay money. The second are more limited in scope and seek an authoritative affirmation by the court as to the existence or non-existence of a legal relationship. Constitutive actions, on their part, do not confine themselves to the determination of a legal situation, but also create, modify, abolish or otherwise vary a legal relationship. See e.g. Kerameus, "Civil Procedure in Greece", 2 South.L.Rev. 175 (1976) = in: Kerameus (Ed.), *Studia Iuridica I* (Thessaloniki, 1980), p. 221. Of these three types of actions only the first and the second one are relevant to EC competition law disputes. Constitutive actions could be a theoretical possibility only if exemptions of Art. 81(3) EC under the previous authorisation system were to be given by civil courts. Such a system of "judicial authorisation" has never, however, been proposed or introduced in Europe.

the preliminary issue whether the prohibition of Article 81 EC applies to the agreement in question.¹⁷ The same is true, when competition law is pleaded as a sword, in case of damages claims or claims for an injunction, pursuant to an antitrust violation. The liability for damages and the right to the injunction will be the main issue of the proceedings, whereas the actual violation of Article 81 or 82 EC will be the preliminary issue.¹⁸

In the past, a part of the theory and of the Community and national jurisprudence had adopted a distinction between competition authorities enforcing EC competition law *à titre principal* and civil courts adjudicating *à titre incident*. This distinction was first implied by the Court of Justice in the *Bosch* case.¹⁹ The competence of national civil courts to apply the EC competition rules as a preliminary issue was, according to the Court, a consequence of the direct effect of Articles 81 (exception made for its third paragraph) and 82 EC. On the other hand, the competence of competition authorities or courts to apply these rules as a main issue derived from Article 84 EC in conjunction with Article 9 of Regulation 17.²⁰ The distinction between application of the competition rules *à titre principal* and *à titre incident* has been criticised as not practical and has now been abandoned by a substantial part of the literature,²¹

¹⁷ See Ioannou, *supra* (1984), p. 432; Favre, "Le droit communautaire de la concurrence devant les juridictions nationales : L'expérience française", in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001), p. 78.

¹⁸ See Ioannou, *supra* (1984), p. 432.

¹⁹ *Bosch*, *op.cit.*, at 51-52.

²⁰ See Ioannou, *supra* (1984), p. 432.

²¹ See e.g. Ioannou, *supra* (1984), p. 444. See also already Deringer, "The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty", 1 CMLRev. 30 (1963-1964), p. 38, who makes no distinction as between main and subsidiary issue. However, many authors continue to distinguish between national competition authorities that apply the competition rules as a main issue and national civil and criminal courts that apply those rules as a subsidiary issue. See e.g. Herbert, "Rapports entre les procédures devant la Commission des CE et les juridictions nationales", 42 Riv.Dir.Ind. I-461 (1993), p. I-463; Gustafsson, "Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era", 27(2) LIEI 159 (2000), p. 160, fn. 6; C. Gavalda and G. Parcani, *Droit des affaires de l'Union européenne* (Paris, 2002), p. 275; Scuffi, "Le sezioni specializzate di diritto industriale per cooperazione comunitaria ed applicazione decentrata delle regole di concorrenza", (2003) *Il Diritto Industriale* 213, p. 218, fn. 21; *idem*, "I riflessi ordinamentali ed organizzativi del regolamento comunitario n. 1/2003 sulla concorrenza", 21 *Il Corriere Giuridico* 123 (2004), p. 213, fn. 1. It is noteworthy that this distinction has created problems to some national courts, which have misinterpreted it. This has been the case in Spain, where the Supreme Court in the *CAMPS.4* judgment of 30-12-93 essentially denied the direct effect of Arts. 81 and 82 EC, unless these provisions had already been applied *à titre principal* by the European Commission or the Spanish authorities. On this judgment and on the erroneous - if not curious - application of the main-subsidiary issue dichotomy, see Navarro Varona and Rating, "Spain", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. V, *Spain, Portugal and Greece* (Baden-Baden, 2000), p. 67 *et seq.* It should be mentioned that this judgment represented one of the most flagrant violations of Community law by a national Supreme Court and has been considered by commentators as one of the paradigm cases, in which the Commission should have sued a Member State for violation of EC law on behalf of one of its organs (see e.g. Tridimas, "Knocking on Heaven's Door. Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", 40 CMLRev. 9 (2003)). The situation seems to have been remedied by a 2000 judgment of the same court (Tribunal Supremo (Sala de lo Civil), 2-6-00, n° 540/2000, *CC v. Distribuidora Industrial S.4*) and very recently the Madrid Commercial Court clearly applied *à titre principal* Article 82 EC and found that the Spanish company Telefónica had to pay damages for abusing its dominant position (Juzgado de lo Mercantil

independent civil claims or counter-claims based on the EC competition provisions, to return to our definition above. In addition, the sanctions imposed are of private nature and essentially function as remedies for the victim of the anti-competitive conduct.²⁶ It is encouraging that this clear distinction is recognised by the recent Green Paper of the Commission on damages actions. Indeed, the Green Paper distinguishes public from private enforcement on the basis of remedial outcomes and sanctions, i.e. fines as opposed to civil damages.²⁷

A final categorisation that is, indeed, of great practical importance and that also refers to the relationship between private and public enforcement, is between “stand-alone” and “follow-on” civil antitrust claims.

The typical representative of a stand-alone case is where a third party sues for damages against the perpetrators of an anti-competitive act, while there has been no interference yet by a public authority, in which case the plaintiff will have the sometimes dire task to prove that there has been an infringement of the competition rules. Raising a competition law point by way of defence or counter-claim to a breach of contract or intellectual property or an unfair competition law action qualifies again as stand-alone litigation, if there has been no intervention of a public authority. In this case, again the party that raises the competition law problem will have to prove the infringement.

A follow-on civil action, on the other hand, takes place when there is already an infringement decision by a public authority that condemns a particular anti-competitive conduct.²⁸ While, in principle private enforcement remains independent of public enforcement, it may well be that the existence of a public decision eases the burden imposed on the plaintiff to prove the infringement or is considered binding as to its findings. This is stipulated expressly by some national competition laws, notably by UK and German law, or it may be a judicial rule of an

²⁶ This, notwithstanding the fact that a specific remedy may not only aim at compensating or protecting the victim but also at “punishing” the perpetrator of the anti-competitive act, as is the case with punitive damages, which, in any case, are awarded to the former. Of course, remedies in the context of private enforcement reflexively serve also the public interest of maintaining effective competition in the market.

²⁷ See para. 3 of the Commission Staff Working Paper accompanying the Green Paper (both cited below): “Private enforcement and public enforcement are the two pillars of enforcement of EC antitrust rules. Private enforcement differs from public enforcement, whereby the public authorities (the Commission at EU level and the national competition authorities at the Member State level) investigate suspected violations of competition law and can impose certain measures and sanctions such as fines on infringing undertakings. Fines are paid into the public budget and the activities of the public enforcer are paid for by the state. Private enforcement actions are paid for by the individual bringing the action, and that individual can recoup the money paid out as part of the award of compensation if the action is successful.”

²⁸ A civil suit brought following another civil suit that was successful cannot, however, be seen as a follow-on action, since there was no public authority decision with *erga omnes* declaratory effect. The successful suit would have led basically to a judgment with a *res judicata* effect limited to the specific litigants and to the specific object of the dispute. Of course, if the two cases are similar, it might be that the burden on the plaintiff to prove an infringement in the second action is practically – if not psychologically – slightly lighter.

estoppel or abuse of process nature that serves the principle of procedural economy. There are, however, legal systems where the existence of an infringement decision by a public authority does not confer any benefit upon the follow-on civil plaintiff, other than a psychological one. The Commission's Green Paper on damages actions aims at considering whether this needs to be changed, so that infringement decisions taken by a public authority in Europe be made binding as to the finding of the infringement over all follow-on civil proceedings, thus substantially improving the position of plaintiffs.²⁹

2. Public and Private Antitrust Enforcement and the Objectives of EC Competition Law

a. Enforcement Objectives

The pairing of public and private enforcement of legal rules is not unique to the antitrust laws. It certainly predates those laws and expresses more fundamental ideas about the relationship between the state and private individuals and their respective roles in the implementation of the law as such.

From a purely *competition* law perspective, antitrust enforcement pursues three systematically different, yet substantively interconnected, objectives.³⁰ The first one is *injunctive*, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that that conduct ceases in the future. The second objective is *restorative or compensatory*, i.e. to remedy the injury caused by the anti-competitive conduct. The third one is *punitive*,³¹ i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions. Ideally, these three basic objectives can be pursued inside an enforcement system that combines both public and private elements.

Private actions, in particular, may well - directly or indirectly - pursue all three objectives. The injunctive objective is served with cease and desist orders and negative or positive injunctions ordered by the civil courts and may, indeed, go further than public enforcement. For example, it may be easier to obtain a preliminary injunction from a national judge than from the European Commission, while the latter, unlike the former, cannot issue orders

²⁹ On the Commission's Green Paper see below.

³⁰ See C. Harding and J. Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (Oxford, 2003), p. 229 *et seq.*

³¹ The term "punitive" is used here in its generic sense and does not necessarily correspond to criminal law.

imposing positive measures to undertakings in Article 81 EC cases.³² Private enforcement primarily serves the restorative-compensatory objective, while the role of public enforcement here can only be minimal.³³ Private actions ensure compensation for those harmed by anti-competitive conduct. Finally, as for the punitive objective, while public enforcement is undoubtedly predominant, here again private actions may nevertheless supplement the retributive and deterrent effect of the public sanctions by attaching punitive elements to the civil nature of the remedies sought.³⁴ This is the case in legal systems that provide for punitive antitrust damages.

b. The Complementarity between Public and Private Antitrust Enforcement

While it is sometimes said, especially by public enforcement officials, that private enforcement, cannot as such make a substantial contribution to the effectiveness of competition law enforcement,³⁵ mainstream antitrust scholarship argues that the ideal antitrust enforcement model should combine both public and private elements. Each of the two systems aims at

³² See *infra*.

³³ It is not correct to exclude any role for public enforcement in this area. There are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of an anti-competitive practice and impose on the perpetrator the obligation to compensate those persons. Indeed, the public agency may pursue this informally, for example through an informal settlement (see *infra* for examples). In addition, some competition regimes also provide for a role for the public authority in claiming damages, acting on behalf of the victims. This is the case in French law, for example (Art. L442-6 *Code de commerce*). For a proposal to confer powers to antitrust authorities to award civil damages to victims of anti-competitive behaviour see Igartua Arregui, "Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain", LIDC Questions 2001/2002, in: <http://www.ligue.org>, p. 5.

³⁴ On the deterrent effect of damages awards see e.g. Mestmäcker, "The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order", 1 EBOR 401 (2000), p. 422; A. Jones and B. Sufrin, *EC Competition Law, Text, Cases, and Materials* (Oxford, 2004), p. 1192; Erämetsä, "Finland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria* (Baden-Baden, 2001), p. 214. It should again be stressed that the term "punitive" in this context is used in its generic sense, so the punitive element in damages awards does not make them criminal in nature. US treble damages awards have always been considered as civil not only inside but also outside the United States. On the question of characterisation of such awards see further Zekoll and Rahlf, "US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public", 54 JZ 384 (1999), pp. 384-385.

³⁵ See e.g. Paulweber, "The End of a Success Story?: The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law", 23(2) *World Competition* 3 (2000), p. 45; Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?", 26 *World Competition* 473 (2003); Fingleton, "De-monopolising Ireland", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?* (Oxford/Portland, 2006), pp. 60-61. For an earlier view, doubtful of the strengths of private antitrust enforcement, see Jacobs, "Civil Enforcement of EEC Antitrust Law", in: *The Art of Governance, Festschrift zu Ehren von Eric Stein*, Michigan Law Review Association (Baden-Baden, 1987), p. 230 *et seq.* The former Advocate General apparently, however, no longer views negatively private antitrust enforcement.

different aspects of the same phenomenon: they are complementary and both are necessary for the effectiveness of the whole competition law enforcement.³⁶

The advantages of private antitrust enforcement have long been stressed in the United States, where studies estimate its ratio to public antitrust suits at between 10 to 1 and 20 to 1.³⁷ The primary function of the private action is clearly compensatory. The victims of anti-competitive practices can only make up for their losses before a civil court and public enforcement cannot have any direct bearing there.³⁸ At the same time, however, private action, apart from its compensatory function, furthers the overall deterrent effect of the law. Thus, economic agents themselves become instrumental in implementing the regulatory policy on competition³⁹ and the general level of compliance with the law is raised.⁴⁰ Indeed, the private litigant in US antitrust has been considered a "private attorney-general".⁴¹ A further advantage is that the weaknesses of public enforcement, most notably the "enforcement gap" generated by the perceived inability of public enforcement to deal with all attention-worthy cases, are counter-balanced.⁴²

From a *Community* competition law perspective, however, there are additional arguments in favour of a system of antitrust enforcement that combines strong elements of private enforcement. First of all, the civil action constitutes in Europe the only complete means (complaints apart) for private parties and individuals to exercise the rights guaranteed by the

³⁶ See Norberg, "Competition Policy of the European Commission: In the Interest of Consumers?", Speech Made at Leuven (20 June 2003), in: <http://europa.eu.int/comm/competition/speeches>, p. 28; Behrens, "Comments on Josef Drexel: Choosing between Supranational and International Law Principles of Enforcement", in: Drexel (Ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law* (Berne/The Hague/London/New York, 2003), pp. 344-345.

³⁷ See C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford, 1999).

³⁸ It might, however, make sense for the victim of anti-competitive conduct to seize the public enforcer in cases where he seeks injunctive relief.

³⁹ See Canivet, "The Responsibility of the Judiciary in the Implementation of Competition Policy", in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD (Paris, 1997), p. 21; Jenny, "Un économiste à la Cour", 1/2005 *Concurrences* 5, p. 8.

⁴⁰ See K.L. Ritter, D.W. Braun and F. Rawlinson, *European Competition Law: A Practitioner's Guide* (The Hague/London/Boston, 2000), pp. 925-926. See also Böge and Ost, "Up and Running, or Is it? Private Enforcement - The Situation in Germany and Policy Perspectives", 27 *ECLR* 197 (2006), who also stress that civil antitrust proceedings contribute to further developing antitrust law.

⁴¹ Per J. Jerome Franck in *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

⁴² On the general advantages of private antitrust enforcement see e.g. Collins and Sunshine, "Is Private Enforcement Effective Antitrust Policy?", in: Slot & McDonnell (Eds.), *Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (London, 1993), pp. 50-52; Roach and Trebilcock, "Private Enforcement of Competition Laws", 34 *Osgoode Hall Law Review* (1996) 461, p. 471 *et seq.*; Yeoung, "Private Enforcement of Competition Law", in: McCrudden (Ed.), *Regulation and Deregulation, Policy and Practice in the Utilities and Financial Services Industries* (Oxford, 1999), pp. 40-43. See also Commission MEMO/05/489, *op.cit.*, under the title "What in the Commission's view are the advantages of private actions for damages?".

Treaty competition provisions, which form part of the Community's economic constitution.⁴³ Pursuant to the Court of Justice's long-standing case law, Articles 81 and 82 enjoy direct effect and grant individuals actionable rights, which national courts must protect.⁴⁴ Secondly, when citizens pursue their Community rights in the national courts, apart from serving their personal interests, they also indirectly act in the Community interest and become "the principal 'guardians' of the legal integrity of Community law within Europe".⁴⁵ The exercise of those rights thus becomes a question of *general Community law*, which confers its benefits closer to the citizen.⁴⁶ This constitutional element of private EC antitrust enforcement means that the conditions and limitations of private actions in the US cannot be uncritically transcribed to the European context without encroaching on individual Community rights.⁴⁷ The European Commission recently embarked upon an ambitious project to further private antitrust enforcement in Europe. In this task it has received the full support of the European Court of Justice, which in 2001 delivered a landmark ruling in *Courage v. Crehan* that set the basis for a system of individual civil liability for breach of the EC competition rules.⁴⁸ According to former Commissioner Monti, in a system combining private and public enforcement, victims of anti-competitive practices, including consumers, must have the opportunity to avail themselves of effective remedies in the form of decentralised private enforcement, so as to protect their rights and obtain compensatory damages for losses suffered.⁴⁹

⁴³ See also Jones, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27 *World Competition* 13 (2004), pp. 14-16.

⁴⁴ *BRT v. SABAM (I)*, *op.cit.*, para. 16.

⁴⁵ See J.H.H. Weiler, *The Constitution of Europe, 'Do the New Clothes have an Emperor?' and Other Essays on European Integration* (Cambridge, 1999), p. 20.

⁴⁶ See Commission Press Release IP/05/1634; Commissioner Kroes, "Delivering Lisbon: The Role of Competition Policy", Speech Delivered at the European Liberal Democrat City Forum (London, 14 September 2005), in: <http://europa.eu.int/comm/competition/speeches>, p. 5, explicitly referring to the enhancement of private enforcement in terms of bringing the benefits of the Commission's fight against competition offences "closer to the citizen". On the principle of Community law enforcement close to the citizen (*Bürgernahe*) see *infra*.

⁴⁷ See e.g. Jones, *supra* (1999), p. 81, who refers to the US limitations as to the class of prospective plaintiffs. Compensation of victims of anti-competitive practices cannot be as easily ignored in Europe as in the US. See *infra*.

⁴⁸ Case C-453/99, *Courage Ltd. v. Bernard Crehan*, [2001] ECR I-6297. On this ruling see Komninos, "New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right in damages", 39 *CMLRev.* 447 (2002).

⁴⁹ See former Commissioner Monti, "Opening Speech: Effective Private Enforcement of EC Antitrust Law", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 3 *et seq.*; *idem*, "A Reformed Competition Policy: Achievements and Challenges for the Future", Speech Delivered at the Center for European Reform (Brussels, 28 October 2004), in: <http://europa.eu.int/comm/competition/speeches>, p. 4.

His successor, Commissioner Kroes, pursued the project enthusiastically, and this led to the publication of a Green Paper in December 2005.⁵⁰

It is interesting to note that the Commission does not stay only at the compensatory qualities of damages awards, but also stresses their contribution to the deterrent effect of the competition rules.⁵¹ Such references echo the “private attorney-general” function of the private litigant in US antitrust.

c. The Relevance of the Goals of EC Competition Law

The question of the relationship and balance between public and private antitrust enforcement in Europe must also be seen in the context of the more substantive question of the goals of EC competition law: is the goal the public interest in safeguarding effective competition in the common market or the private interest in protecting one’s economic freedom?⁵²

There is a widespread misunderstanding as to the interests protected by competition law in the contexts of public and private enforcement. Thus, some authors distinguish between public enforcement, which pursues the public interest of protecting the competition norms through administrative or criminal sanctions, and private enforcement, which pursues the private interest of the protection of competitors and consumers through civil “sanctions”, most notably civil claims for damages.⁵³ The European Commission has also at times followed a similar approach, with statements which seem to ignore the instrumental character of civil claims. Indeed, the Commission has been reproached for insisting on distinguishing between public authorities, whose acts are guided by the public interest, and national courts,

⁵⁰ *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final. The Green Paper is accompanied by a Staff Working Paper which sets out the various options more discursively: *Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2005) 1732.

⁵¹ See *Commission XXVth Report on Competition Policy – 2005* (Brussels/Luxembourg, 2006), para. 31: “Not only do actions for damages allow victims of infringements of EC antitrust law to obtain compensation, they also create an additional incentive for undertakings to respect the EC antitrust rules”.

⁵² On the bearing of private enforcement on the goals of antitrust, in the context of Greek competition law, see e.g. V.G. Hatzopoulos, *The Essential Facilities Doctrine in EU and Greek Competition Law* (Athens/Komotini, 2002) [in Greek], p. 165 *et seq.* For an Italian point of view on the same issue see Toffoletto, “Il risarcimento del danno”, in: Toffoletto & Toffoletti (Eds.), *Antitrust: le sanzioni* (Milano, 1996), pp. 123-124.

⁵³ See e.g. Braakman, “The Application of the Modernised Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions”, in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 161; Harding and Joshua, *supra* (2003), p. 239. Compare also Shaw, “Decentralization and Law Enforcement in EC Competition Law”, 15 LS 128 (1995), pp. 158-159: “Private actions will generally be favoured where competition is seen primarily as a private, market-based matter, with competition policy being correspondingly limited in scope. They will tend to be discouraged where competition policy implies the existence of some element of public interest in the maintenance of a particular type of trading structure”.

which decide disputes pertaining to the private interest.⁵⁴ Such a distinction does not do justice to the role of civil courts when they enforce competition law in the context of private disputes between economic operators, since they in fact have to consider the economic public policy in their judgments when the dispute in question has a wider impact on the market. In this sense, private interest plays a complementary role to the public interest.⁵⁵

Thus, it is correctly recognised that the courts cannot simply confine themselves to considering the interests of the litigants, but must also have regard to the general interests of economic policy. This explains why courts in some jurisdictions must raise the competition law question even *ex proprio motu* and may not allow an anti-competitive agreement to be performed, even if the parties have not raised the issue of its legality.⁵⁶ Likewise, the possibility for public competition authorities in the EC and in some national competition systems to intervene and submit observations in the course of civil proceedings is partly due to the public policy/interest nature of this kind of competition law-related litigation.⁵⁷ Finally, laws that attach a punitive element to civil claims for damages, as is the case of US antitrust, precisely prove that there is something more at stake than just the pursuit of private interest.

The instrumental role of private antitrust enforcement must not, however, be confused with the objectives of competition policy as such. The dominant and more correct view is that EC

⁵⁴ See Mestmäcker, *supra* (2000b), p. 423; *idem*, "The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 233-234. See in this regard some Commission references to the role of national civil actions: *Explanatory Memorandum of the September 2000 Regulation proposal*, p. 5 ("unlike national authorities or the Commission, which act in the public interest, the function of national courts is to protect the rights of individuals"); *Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC*, OJ [2004] C 101/54, para. 4 ("where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities"); *Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ [2004] C 101/65, para. 27 (similar language). See also former Commissioner Monti, "Opening Statement: The Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 6. To be fair to the Commission, these are statements that echo judicial pronouncements, though not of the ECJ; compare in this regard case T-24/90, *Automec Srl v. Commission (II)*, [1992] ECR II-2223, para. 85: "...unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations *inter se*, an administrative authority must act in the public interest". Commission officials have also made the distinction between public and private interest on numerous occasions.

⁵⁵ See Bourgeois, "EC Competition Law and Member State Courts", in: Hawk (Ed.), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1994), p. 486; C. Lucas de Leyssac and G. Parleani, *Droit du marché* (Paris, 2002), p. 971.

⁵⁶ See Canivet, *supra* (1997), p. 24. On the *ex officio* application of EC competition law by courts and arbitrators see the pertinent parts below.

⁵⁷ See Rinczaux, "Les autorités de la concurrence doivent-elles être autorisées à intervenir dans les procédures relatives à des problèmes de concurrence, plus particulièrement lorsqu'elles sont menées devant les juridictions ordinaires ? Dans l'affirmative, quel devrait être le fondement de leur pouvoir d'intervention ? Rapport international", LIDC Questions 2001/2002, in: <http://www.ligue.org>, p. 1.

competition law aims at conditions of effective competition (protecting the institution of competition – *Institutionsschutztheorie*),⁵⁸ whereas economic freedom (protection of private rights – *Individualschutztheorie*) is but a reflexive subsidiary aim of protecting competition.⁵⁹ Protection of private rights cannot by itself set in motion the mechanisms for the protection of free competition, since the law, as it stands, is indifferent to harm caused to a specific person, unless that harm is the consequence of a certain practice whose object or effect is the distortion-prevention-restriction of effective competition in the market. The law therefore does not require that a specific agreement or concerted practice should actually cause harm to a person, in order to prohibit it; it is sufficient if the *object* of the agreement or practice is to restrict competition in the public interest sense. Equally, an agreement or practice might cause harm to certain persons but still not be considered anti-competitive, because it may not affect appreciably competition in the market (*de minimis*).

The existence of private actions and, in particular the availability of damages to the victim of anti-competitive practices, is perfectly consistent with the public interest that is inherent in competition norms, notwithstanding the confusion in some authors, who see the private

⁵⁸ In a recent brochure for the general public, the Commission refers to the goals of competition policy in the following terms: "The Community's competition policy pursues a precise goal, which is to defend and develop *effective competition* in the common market. Competition is a basic mechanism of the *market economy* involving *supply* (producers, traders) and *demand* (intermediate customers, consumers). Suppliers offer goods or services on the market in an endeavour to meet demand. Demand seeks the *best ratio between quality and price* for the products it requires. The most efficient response emerges as a result of a contest *between suppliers*" (European Commission, *Competition Policy in Europe and the Citizen* (Luxembourg, 2000), p. 7 (emphasis in the original)). For a more succinct definition of the objective of Art. 81(1) EC, see also para. 13 of the Commission's Notice on Art. 81(3) EC (cited *infra*): "the objective ... is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources". See also para. 4 of the DG-COMP Discussion Paper on Application of Article 82 of the Treaty to Exclusionary abuses: "the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation". On the aims of EC competition law see e.g. O. Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81* (Oxford, 2006), pp. 10-21.

⁵⁹ See the "dialogue" between the Presidents of the CFI and ECJ in the *IMS Health* interim measures cases. In case T-184/01 R, *IMS Health Inc. v. Commission*, [2001] ECR II-3193, para. 145, the President of the CFI stressed that the primary purpose of Article 82 EC was "to prevent the distortion of competition, and especially to safeguard the interests of consumers, rather than to protect the position of particular competitors". On appeal, in case C-481/01 P(R), *NDC Health Corporation and NDC Health GmbH & Co. KG v. IMS Health Inc.*, [2001] ECR I-3401, para. 84, the President of the Court of Justice corrected these grand statements. According to President Rodríguez Iglesias, such statements could not be accepted without reservation, since they "could be understood as excluding protection of the interests of competing undertakings from the aim pursued by Article 82 EC, even though such interests cannot be separated from the maintenance of an effective competition structure". See further Temple Lang, "European Community Competition Policy – How Far Does It Benefit Consumers?", 18 *Boletín Latinoamericano de competencia* 128 (February 2004), in: <http://europa.eu.int/comm/competition/international/others>, p. 130. The combined purpose approach is also accepted under national competition laws. Under Greek competition law for example, the prevailing view is that both effective competition in the market and economic freedom are protected (see T. Liakopoulos, *Industrial Property* (Athens, 2000) [in Greek], pp. 15, 494-498).

interest, which is the dominant motivation in a private suit, at variance with the public interest pursued by the competition norms.⁶⁰

The Court of Justice has solemnly recognised that private antitrust suits strengthen the working of the Community competition rules and discourage practices that are liable to restrict or distort competition, thus making a significant contribution to maintaining effective competition in the Community.⁶¹ In other words, this is a case where the private interest contributes to the safeguarding of the public interest, so no antinomy should exist. Thus, private suits do not alter the substance of EC competition law, which is the protection of the public interest, as that is expressed in the goal of maintaining effective competition in the market. Even if we suppose that in a given case a civil litigant's private interest might not be compatible with the public interest, as may be the case, for example, if inefficient competitors allege the "anti-competitive nature" of certain practices that in reality enhance effective competition, such a private suit would fail, because the alleged harm would not have been caused by conduct prohibited or illegal under Articles 81 and 82 EC. Consequently the private interest can never contradict the public interest. Hence the complementarity and the "private attorney-general" function of the civil litigant.

In sum, an effective system of private enforcement does not alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining a free and undistorted competition, and should by no means be thought of as antagonistic to the public enforcement model. Ideally the two models can work to complement each other.⁶² The Commission has

⁶⁰ See e.g. in the framework of Greek competition law the rather extreme position of Schinas, "The Greek Experience of the Protection of Free Competition: Basic Directions", in: Schinas (Ed.), *Protection of Free Competition, The Practice of EPA/EA* (Athens/Komotini, 1992) [in Greek], p. 28 *et seq.* The author, a former chairman of the Greek Competition Committee, excludes the possibility of private suits because of the public interest character of competition legislation, which is considered a *lex specialis* with regard to the Greek law of non-contractual liability. A similar position has been held in Spain by Alonso Soto, again a former public antitrust enforcer, who argues forcefully for the application of EC and national competition law exclusively by the competition authorities. This position might explain the long-standing and irritating failure of Spanish courts to comply with the direct effect of Arts. 81 and 82 EC before national civil courts (see *infra*). See further Creus and Fernández Vicién, "Rapport espagnol", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 96 *et seq.* See also for a similar view held by Portuguese courts, though now apparently superseded, Ruiz, "Rapport portugais", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 238.

⁶¹ *Courage, op.cit.*, para. 27.

⁶² See e.g. Recital 7 Reg. 1/2003: "The role of the national courts here complements that of the competition authorities of the Member States". Such complementary function was advocated by the majority of the participants in the 2001 Florence EU Competition Law Workshop that dealt with private enforcement. See individual contributions and discussions in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003); also Goyder, "Providing Support for National Judges in Dealing with Competition Cases", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 576-

finally realised this by speaking of the two limbs of antitrust enforcement as complementary and serving the same aim “to create and sustain a competitive economy”⁶³ and by also stressing the public interest element in private actions for damages.⁶⁴

3. The Independence of Private Antitrust Enforcement

a. Independence as Principle

Notwithstanding their substantive complementarity, private and public enforcement remain institutionally independent of each other. The independence of the two models means that in principle there is no hierarchical relationship as between the former and the latter, or between the public authority and the “private attorney-general”. Introducing a rule of primacy would be problematic because of the principles of separation of powers⁶⁵ and judicial independence and also because it would undermine the role of courts as enforcers of equal standing.⁶⁶ The fact that the Court of Justice appears to have entrusted the Commission with a primacy over national proceedings and courts does not contradict our analysis here.⁶⁷ This “primacy” is not

577. There are valid reasons to believe that such a mixed model may well be the system of tomorrow. See below on the new UK model introduced by the 2002 Enterprise Act.

⁶³ See Green Paper, under section 1.1: “The antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.” See also the intervention by Emil Paulis at the ERA Conference on Private Enforcement in EC Competition Law: The Green Paper on Damages Actions (Brussels, 9 March 2006), recognising the “public role” of national courts.

⁶⁴ See Commission Staff Working Paper, para. 52: “The right of private parties to bring an action for damages must be seen as being in the public interest.”

⁶⁵ On the principle of separation of powers as between the Commission and national courts see Paulis, “Coherent Application of EC Competition Rules in a System of Parallel Competences”, in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 419–422, who holds that this principle does not apply to the relationship between the Community legal order and national legal orders. See, however, the approach by Judge Edward, who contradicts this (Edward, “Panel Three Discussion: Courts and Judges”, in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 485). The former view is very formalistic and does not do justice to the integrated nature of the Community legal order. Separation of powers obviously becomes a problem only for legal systems that entrust public enforcement decision-making to administrative authorities. When decision-making rests with the courts, as in Ireland or in the US, there is no problem of principle at stake.

⁶⁶ It should be stressed that the US Department of Justice has never enjoyed any kind of “primacy” over private actions. See Jones, “A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US”, in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 99.

⁶⁷ Case C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [2000] ECR I-11369. See *infra*.

one of the Commission, as *competition authority*, over *civil courts*, but rather of the Commission, as *supranational Community organ*, over *national courts*.⁶⁸

This principle is sometimes missed by public enforcement officials, who tend to take an expansive view of the ambit of public enforcement.⁶⁹ Such paternalistic attitudes ought to be resisted, however, not only because they blur the two distinct limbs of antitrust enforcement, but more importantly, because they demotivate market players from assuming their role as private attorneys-general, thus prejudicing the overall deterrent effect of private action. They may also estrange national judges, who may not wish to get too much involved in an area in which they will always be under the scrutiny or dominance of administrators.

A comparative analysis of national competition laws confirms the independence of private enforcement vis-à-vis public enforcement.⁷⁰ This is not affected by the possible deference paid on occasion by civil courts to competition authorities' decisions.⁷¹ Again, such an attitude does not indicate the primacy of public over private enforcement, or of administrative over civil proceedings, but may simply reflect the principle of economy in legal proceedings, which may make it inappropriate to repeat parts of the procedure before a civil generalist court, if a specialist authority or court has already dealt with the same facts.⁷²

⁶⁸ In the pertinent part we argue that in reality *Masterfoods* establishes no primacy of the Commission over national courts, but rather imposes duties on the latter to apply Community law in a consistent way under the final control of the Court of Justice through the Art. 234 EC procedure. See also Paulis and Gauer, "La réforme des règles d'application des articles 81 et 82 du Traité", 11 JdT (Eur.) 65 (2003), p. 69; *contra* Kjolbye, 39 CMLRev. 175 (2002), p. 181, who seems to be seeing *Masterfoods* as establishing a primacy of the Commission over national court proceedings.

⁶⁹ Compare the language used by former Commissioner Monti to describe the *amicus curiae* mechanism: "These means of interactions are intended to allow the Commission ... to draw courts' attention to important issues relating to the application of EU antitrust rules and *contribute to the coherence of their rulings*" (see Monti, "EU Competition Policy after May 2004", Speech Delivered at the Fordham Annual Conference on International Antitrust Law and Policy (New York, 24 October 2003), in: <http://europa.eu.int/comm/competition/speeches>, p. 5, emphasis added). Certainly such statements do not make much for the independence of private enforcement.

⁷⁰ See e.g. on the Austrian legal system Eilmansberger and Thyri, "Austria", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), p. 51. According to these authors, it is doubtful whether a civil court could suspend proceedings until the Austrian Cartel Court issues a decision. This would probably not qualify as a "prejudicial preliminary question of law" under s. 190 of the Austrian Code of Civil Procedure. On French law, see Idot, "France", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), pp. 179-180.

⁷¹ See, for example, with reference to Italian law, Scuffi, "Established Principles and New Perspectives in the Italian Antitrust Case Law", in: Raffaelli (Ed.), *Antitrust between EC Law and National Law, Treviso 16-17 May 2002* (Bruxelles/Milano, 2003), pp. 277-278, clearly distinguishing the question of autonomy and independence of private enforcement from the question of the occasional *de facto* deference paid to decisions of the Italian competition authority by civil courts.

⁷² With regard to the UK, see Marsden and Smith, "United Kingdom", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), speaking of a certain precedence of public over private enforcement "as a matter of practicality". A good example is *Iberian UK v. BPB Industries plc* (Ch.), ([1996] 2 CMLR 601) where the English High Court held that if parties have disputed an issue before the Commission and have had a reasonable opportunity to challenge

b. The Commission Green Paper and National Competition Laws on the Independence of Private Enforcement

The Commission's recent Green Paper is somewhat unclear as to the relationship between private and public enforcement. On the one hand, the Commission clearly sees private enforcement as in principle independent,⁷³ so that potential plaintiffs do not need to wait for a condemnation of anti-competitive conduct in a public enforcement action before seizing civil courts. The Commission has made clear that it is "keen to see increased private enforcement of the full range of competition infringements under EC law and not just additional enforcement in cases already dealt with by the public authorities (so called "follow-on actions")."⁷⁴ In other words, the aim of the Green Paper is also to facilitate "stand-alone" actions in cases which public enforcement agencies could not or did not wish to deal with. This certainly shows that, at least as a matter of principle, private enforcement is seen as independent of public enforcement.⁷⁵

On the other hand, however, the Green Paper aims at introducing a binding effect or at least a rebuttable presumption for infringement decisions of competition authorities of the EU

the Commission's decision, they are estopped from pleading that issue anew and contradicting the Commission's view in civil proceedings. See further Goyder, "Reliance on Commission Decisions in National Courts", in: Andenas & Jacobs (Eds.), *European Community Law in the English Courts* (Oxford, 1998), pp. 179 *et seq.*; Peretz, "Should Competition Authorities Be Authorized to Intervene in National Competition Proceedings, Especially in the Courts? If they Should, then in what Circumstances and to What Extent Should this Be the Case? National Report from the United Kingdom", LIDC Questions 2001/2002, in: <http://www.ligue.org>, p. 6. See also *British Leyland v. Wyatt*, [1979] 3 CMLR 79, where the High Court treated a non-appealed Commission decision as having the same effect as a judgment by the Court of Justice; compare *contra Merson v. Rover Group Ltd.*, 22 May 1992, not reported, cited in the *Iberian* case, where the court came to the conclusion that it was not bound by the outcome of European competition proceedings. This whole issue has now been revisited in England by the *Crehan* line of cases (see *infra*). Some national competition laws also contain provisions with the aim of avoiding such a duplication of proceedings. Thus, under Art. 18 of the Greek L. 703/1977 the judgments of the administrative courts that review the Competition Committee decisions have the force of *erga omnes res judicata* before the civil courts. The judgments of the latter, on the other hand, enjoy *res judicata* effect only *inter partes* and do not bind the Competition Committee.

⁷³ See e.g. Commissioner Kroes, "More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate", Opening Speech at the Conference 'Private Enforcement in EC Competition law: The Green Paper on Damages Actions' (Brussels, 9 March 2006), in: <http://europa.eu.int/comm/competition/speeches>, p. 4: "Private actions should not be dependent on public enforcement. We need a system that allows private actions to stand on their own two feet". See also para. 3 of the Commission Staff Working Paper which refers to private and public enforcement as "the two pillars of enforcement of EC antitrust rules", thus viewing both as of an equal footing.

⁷⁴ Commission MEMO/05/489, *op.cit.*, under the title "What types of infringement does the Commission think private damage actions should enforce?"

⁷⁵ Compare *XXVth Report on Competition Policy – 2005*, *op.cit.*, para. 31, which stresses that actions for damages should be "an autonomous means of enforcement". See also De Smijter, Stropp and Woods, "Green Paper on Damages Actions for Breach of the EC Antitrust Rules", (2006-1) *EC Competition Policy Newsletter* 1.

Member States. Thus, the finding of a competition law infringement will either bind civil courts or reverse the burden of proof as to the existence of illegal behaviour, i.e. anti-competitive conduct.⁷⁶ In those cases, the main task of the civil courts will be to decide whether the plaintiffs have suffered harm and to award damages. However, while these proposals create an initial impression of public enforcement “primacy”, in reality they are merely meant as an incentive to encourage follow-on civil actions by making it easier for the victims of anti-competitive practices to rely on findings by the competition authorities rather than having to prove a competition law infringement anew. These proposals do not aspire to give decisions by public enforcement agencies a binding effect over all kinds of parallel civil proceedings. Thus, it is not proposed that findings of national competition authorities should have a bearing on civil litigation when, for example, the litigants raise the nullity of a contract or when the parties seek a remedy other than damages. If the binding effect of national authorities’ decisions were to be extended to such cases, then one could indeed speak of a principle of primacy of public over private antitrust enforcement. In such a case the courts would be deprived of the possibility to apply and decide the substantive competition law norms, therefore the aim of involving civil judges in antitrust enforcement in Europe would be seriously impaired.

The same can be said of those national competition laws that have recently been amended with the aim of facilitating follow-on civil actions for damages by conferring a binding effect on final decisions by public authorities declaring that there has been an infringement of competition law. Thus, section 58A of the UK Competition Act, as subsequently amended, confers a binding effect on decisions of the Office of Fair Trading (OFT), the Competition Appeal Tribunal (CAT) on appeal from the OFT, and the European Commission but this provision clearly specifies that it “applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement”.⁷⁷ In other words, the UK Act does not provide for a general principle of law that makes findings by the public authority binding on all kinds of civil proceedings. What section 58A of the UK Act really refers to is follow-on civil actions for damages, and the aim is to facilitate such actions from

⁷⁶ Green Paper, Question C, Option 8.

⁷⁷ This is clearer if one reads para. 87 of the *Explanatory Notes to the Enterprise Act 2002*, in: <http://www.legislation.hmso.gov.uk/acts/en2002/2002en40.htm>: “Section 20: Findings of infringements. Subsection (1) inserts a new section 58A in CA 1998. The new section provides that certain decisions of the OFT or the CAT regarding an infringement of competition law are to bind the courts *for the purpose of a subsequent claim for damages*” (emphasis added).

an evidentiary point of view.⁷⁸ This does not mean that such binding effect extends to concurrent civil proceedings, in which for example the nullity of an agreement arises in the context of claims based on contract.

Similarly, section 33(4) of the recently amended German Competition Act (7. *GWB-Novelle*), which goes even further in conferring a binding effect on all Commission, *Bundeskartellamt*, and even other Member States' national competition authorities' decisions, is confined to follow-on civil litigation, basically aiming at facilitating damages claims against convicted infringers.⁷⁹ Indeed, a German court has recently confirmed that this provision does not entail a duty for civil courts to stay proceedings and await the adoption of a contemplated infringement decision by a competition authority or its finality. Instead, the civil court has power to adjudicate on the merits, since it enjoys parallel competence to deal with an action for damages based on the competition law violation concerned. The German court, after distinguishing the spirit of s. 33(4) *GWB*, which is to facilitate follow-on claims, specifically stressed that the administrative proceeding leading to fines has in principle no priority or primacy over the concurrent civil proceeding.⁸⁰ This ruling is fully compatible with the principle of independence of private enforcement.

c. Practical Problems in the Interrelationship between Public and Private Enforcement: Settlements, Leniency, Amount of Fines and Damages

The principle of independence of private antitrust enforcement has many serious practical consequences. Courts are not bound in the least by the administrative practice of antitrust authorities with regard to their discretion as to whether or not to settle a case or offer certain companies immunity with a view to obtaining useful information in their pursuit of a cartel. Thus, a possible decision by the Commission or national competition authorities to accept commitments by companies, instead of proceeding to a finding of infringement, and to close the administrative proceedings by rendering the commitments binding on those companies, does not bind national civil courts as to the applicability or non-applicability of Articles 81

⁷⁸ See Rodger, "Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages?", 24 *ECLR* 103 (2003), pp. 108-109.

⁷⁹ See Hempel, "Privater Rechtsschutz im deutschen Kartellrecht nach der 7. *GWB-Novelle*", 55 *WuW* 362 (2004), p. 371; Moch, "Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven", 56 *WuW* 39 (2006), p. 41.

⁸⁰ OLG Düsseldorf, 3.5.06, VI-W (Kart) 6/06 – *Zementkartell*, 56 *WuW* 913 (2006).

and 82 EC, and the courts remain free to decide whether or not there has been an infringement of Community competition law.⁸¹

Equally, national civil courts are not bound by administrative leniency schemes.⁸² Immunity from administrative fines is totally unconnected with civil litigation claims. The recent de-trebling of antitrust damages for corporate amnesty applicants in the US does not call the above principle into question, because de-trebling will take place only if the amnesty beneficiary assists the plaintiff in his private action. Thus, the 2004 Antitrust Criminal Penalty Enhancement and Reform Act only limits the damages recoverable from a corporate amnesty applicant to the harm actually inflicted by the applicant's conduct, i.e. to single and not treble damages, if that person also co-operates with private plaintiffs in their damage actions against the remaining cartel members. An appropriate level of co-operation as defined by the Act involves: (a) providing a full account of all facts relevant to the civil action; (b) furnishing all documents relevant to the civil action; and (c) making oneself available for interviews, depositions and testimonies in connection with the civil action.⁸³ This shows that the US rule which governs the interface between the US leniency policy and private enforcement is not one-sided, but rather aims at protecting the effectiveness of both elements. In Europe, the rather under-developed state of private enforcement was not considered to deter companies from applying for leniency, so until very recently no case had been made for imposing limitations on private actions in cases of leniency applications.⁸⁴ The Green Paper for the first time attempts to address this question and moves to the US direction. The policy options considered include the non-discoverability of leniency applications⁸⁵ and the possibility to lessen the civil liability of a leniency applicant.

⁸¹ Art. 9 and Recital 13 Reg. 1/2003. See *infra*. National courts cannot undermine the effectiveness of the Commission commitments decision or interfere with the exercise of the Commission's discretion in that decision, though they can choose to proceed to their own analysis as to the overall legality or illegality of the practice in question, thus leading to a judgment with *inter partes res judicata* effect, while the Commission's commitments remaining binding *erga omnes*.

⁸² In the EU, see *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OJ [2002] C 45/3.

⁸³ The new Act also limits the recovery of damages from amnesty applicants to damages attributable to the defendant, i.e. it eliminates joint and several liability for successful amnesty applicants. For critical comments see Yon, 1 *Concurrences* 102 (2004), pp. 106-107.

⁸⁴ See further Idot, "Une question d'actualité en droit de la concurrence : Programmes de clémence et internationalisation", in: *Droit et actualité, Études offertes à Jacques Béguin* (Paris, 2005), pp. 378-379; Prieto and Roda, "Quelles évolutions pour la clémence dans l'Union européenne ?", 3/2005 *Concurrences* 12, p. 14. On the EC state of affairs see also former Commissioner Monti, "Priorities for EU Competition Policy", in: Hellenic Competition Committee (Ed.), *EU Competition Law and Policy, Developments and Priorities, Athens Conference, April 19th 2002* (Athens, 2002), p. 12.

⁸⁵ We deal below with this question. See the chapter on the co-operation between the Commission and national courts.

The particular question of reducing the civil liability of successful leniency applicants is quite complex and goes to the core of the relationship of public with private enforcement. The Green Paper on damages examines two options. One would be to grant a successful leniency applicant the option to claim a rebate on any damages claim facing him, in return for helping claimants bring damages claims against all cartel members.⁸⁶ The claims against the other infringers, jointly and severally liable for the entire harm, would remain unchanged.⁸⁷ Another option would be to remove joint and several liability for the successful leniency applicant and limit his liability to the share of the harm corresponding to his share in the cartelised market.⁸⁸

As with the US case, we see that the EC proposals do not call into question the independence of private enforcement but rather aim at ensuring that the effectiveness of the Leniency Notice is not compromised. Victims of anti-competitive practices will still be compensated fully: indeed, if the first option of the Green Paper is preferred, they will be better off, as the leniency beneficiary will be under a duty to assist plaintiffs bring a damages claim against the other cartel members.

Finally, the imposing of an administrative fine by the Commission or a national competition authority on an undertaking has no significance in a civil trial centred on the same facts and undertakings. In other words, the *non bis in idem* principle does not apply as between administrative and private enforcement.⁸⁹ Conversely, private damages awards that precede administrative (public) proceedings should, in principle, have no bearing on the possible fines. Taking into account such damages awards as attenuating circumstances for the imposition of administrative fines would not further the overall deterrent effect of EC competition law enforcement.⁹⁰

⁸⁶ Option 29 of the Green Paper.

⁸⁷ If there was a system of double damages for horizontal cartels, this rebate would de-double the award for the leniency applicant, thus restoring single damages as the content of the claim which he faces.

⁸⁸ Option 30 of the Green Paper.

⁸⁹ See Temple Lang, "EEC Competition Actions in Member States' Courts - Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law", in: Hawk (Ed.), *Antitrust and Trade Policies of the European Economic Community 1983, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1984), p. 265; Jones and Sharpston, "Beyond *Delimitis*: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation", 3 Columbia JEL 85 (1996-97), p. 91.

⁹⁰ See, however, Commission Decision 1999/60/EC of 21 October 1998 (*Pre-Insulated Pipe Cartel*), OJ [1999] L 24/1, para. 172, where the Commission took into account as an "extenuating circumstance", justifying the considerable reduction of a fine, the payment of substantial damages by one of the addressees of the Commission Decision to a victim of the anti-competitive conduct. This case has been rightly criticised by S. Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence* (Paris, 2002), p. 482, fn. 3016. In another case, the Commission reduced the administrative fine imposed on an undertaking because the latter offered and paid extra-judicially substantial financial compensations to third parties identified in the Statement of Objections as victims (Commission Decision 2003/675/EC of 30 October 2002 (*PO Video Games, PO Nintendo Distribution and Omega-Nintendo*), OJ [2003] L 255/33, paras. 440-441). See further Van

Haasteren and Peña Castellot, "Commission Fines Nintendo and Seven of its European Distributors for Colluding to Prevent Parallel Trade in Nintendo Products", (2003-1) *EC Competition Policy Newsletter* 50, p. 53. The Commission should not be criticised as much in this case because it took into account not damages awarded by final judgment but rather extrajudicial compensations. In joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. Et al. v. Commission*, [2004] ECR II-1181, para. 348, one of the applicants had argued that the Commission had failed to consider as an attenuating circumstance the fact that it had concluded civil law settlements in the US and Canada. The Court rejected the argument because the settlements in question had no impact on the infringement committed in the EEA. This may mean that, according to the CFL, civil damages awards and settlements in the EU may be an appropriate attenuating circumstance in the imposition of administrative fines. Such an approach should be resisted however and should be limited only to exceptional circumstances of settlements or of compensatory sums paid of the perpetrators own motion.

B. THE INSTITUTIONAL LAW SPECTS OF THE APPLICATION OF EC COMPETITION LAW BY NATIONAL COURTS

1. The Old Administrative Authorisation and Notification System

a. The "Foundational" Public Enforcement System

The past forty years of competition law enforcement, based on the old Regulation 17 of 1962,⁹¹ were characterised by a centralised model where the Commission enjoyed a *de facto*, and in some instances, notably the granting of individual exemptions under Article 81(3) EC, a *de iure* enforcement monopoly, while the role of the national legal systems (with one or two notable exceptions) and courts was marginal. It is true that the Treaty of Rome, while recognising in Article 85 EC the Commission's role in ensuring "the application of the principles laid down in Articles 81 and 82", did not dictate such a degree of centralisation.⁹² Indeed, the degree of centralisation created by Regulation 17 departed from the Community standard, according to which Community law is to be enforced primarily by national administrative authorities (*administration communautaire indirecte*)⁹³ and by national courts (*juges communautaires de droit commun*).⁹⁴ However, when Regulation 17 was enacted,

⁹¹ Council Regulation No. 17 of 6 February 1962 - First Regulation Implementing Articles 85 and 86 of the Treaty, JO [1962] L 13/204.

⁹² See D.J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, 1998), pp. 349 and 386; Ehlermann, "The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution", 37 CMLRev. 537 (2000), pp. 538-540.

⁹³ See Gerber and Cassinis, "The 'Modernisation' of European Community Competition Law: Achieving Consistency in Enforcement - Parts I + II", 27 ECLR 10 + 51 (2006), p. 10. On this Community transformation of national administrative authorities see in general Dubey, "Administration indirecte et fédéralisme d'exécution en Europe", 39 CDE 87 (2003), p. 87 *et seq.* See also Temple Lang, "The Duties of National Authorities under Community Constitutional Law", 23 ELRev. 109 (1998); Kakouris, "Special Administrative Courts of the Member States and the Court of the European Communities", in: Kakouris (Ed.), *Perspectives, Droit Communautaire Européen, Théorie Générale du Droit, Domaine Méta-juridique* (Athènes/Komotini, 1998), p. 513; Chiti, "L'organismo di diritto pubblico e la nozione comunitaria di pubblica amministrazione", in: *Annuario 1999-2000 dell'Associazione italiana dei professori di diritto amministrativo* (Milano, 2001), pp. 37-38; V.I. Karageorgou, *Administrative Procedure under the Influence of European Integration* (Athens/Thessaloniki, 2005) [in Greek], p. 14; Sydow, "Europäisierte Verwaltungsverfahren", 45 JuS 97 (2005), p. 97.

⁹⁴ See *inter alia* Ehlermann, "Ein Plädoyer für die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedstaaten", in: Capotorti, Ehlermann *et al.* (Eds.), *Du Droit International au Droit de l'Intégration, Liber Amicorum Pierre Pescatore* (Baden-Baden, 1987), pp. 217 *et seq.*; O. Dubos, *Les juridictions nationales, juge communautaire, Contribution à l'étude des transformations de la fonction juridictionnelle dans les États-membres de l'Union européenne* (Paris, 2001). On this *dédoulement fonctionnel* as to national authorities and courts see in general R. Lecourt, *L'Europe des juges* (Bruxelles, 1976), pp. 8-9; P. V. Pavlopoulos, *Guarantees of the Judicial Protection in European Community Law* (Athens/Komotini, 1993) [in Greek], p. 69; D. Simon, *Le système juridique communautaire* (Paris, 2001), pp. 163-164, 167; Anagnostopoulou-Yiannakou, "The National Judge as a Factor of the Community Justice", in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in

centralisation was a conscious choice with a view to constructing a European competition law enforcement system.⁹⁵ The centralised system of enforcement performed in a sense a “pedagogical” function.⁹⁶ Throughout the long ensuing period, therefore, the Commission was the basic public enforcement authority for EC competition law purposes.⁹⁷ National competition authorities started to enter the field only recently, and sometimes reluctantly, since at least with regard to Article 81 EC, their hands were tied by their inability to apply Article 81(3) EC and to grant individual exemptions to restrictive agreements. In addition, most national authorities were not until recently empowered by national law to apply Articles 81 and 82 EC.

National courts, on the other hand, did have concurrent jurisdiction to enforce Articles 81(1) and 82 EC, since these provisions were recognised as (horizontally) directly effective by the Court of Justice,⁹⁸ but under the exemption monopoly they could not grant individual exemptions. Nevertheless, during these past forty years the role of national courts in EC competition enforcement has not been particularly strong and private enforcement in Europe

Greek], p. 74; Rademacher, “Gemeinschaftsrechtliche Staatshaftung für höchstrichterliche Entscheidungen”, 23 NVwZ 1415 (2004), p. 1416; Canivet, “Les réseaux de juges au sein de l’Union européenne : Raisons, nécessités et réalisations”, in: Idot & Poillot-Peruzzetto (Eds.), *Internormativité et réseaux d’autorités, L’ordre communautaire et les nouvelles formes de relations* (Toulouse, 24 Octobre 2003), *Petites Affiches*, 5-10-2004, No. 199, 45, p. 46. See case T-51/89, *Tetra Pak Rausing SA v. Commission*, [1990] ECR II-309, para. 42: “when applying Article 86 [now 82] ... the national courts are acting as Community courts of general jurisdiction” Compare, however, AG Léger’s Opinion in case C-224/01, *Gerhard Köbler v. Austria*, [2003] ECR I-10239, para. 66, who sees the *dédoublement fonctionnel* more symbolically than literally: “That expression must not be understood literally, but symbolically: where a national court is called upon to apply Community law, it is in its capacity as an organ of a Member State, and not as a Community organ, as a result of dual functions.”

⁹⁵ See Gerber, *supra* (1998). See also the comprehensive historical exposé made by Tesauro, “Some Reflections on the Commission’s White Paper on the Modernisation of EC Antitrust Policy”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 259 *et seq.*

⁹⁶ See Tesauro, “Modernisation and Decentralisation of EC Competition Law”, in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000), pp. 1-3; Pons, “Nouveaux enjeux et réformes de la politique européenne de la concurrence”, *Petites Affiches*, 5-11-2001, No. 220, 21, p. 25.

⁹⁷ See Venit, “Slouching towards Bethlehem: The Rule of Reason and Notification in EEC Antitrust Law”, 10 BCInt’lComp.LRev. 17 (1987), p. 19; Reynolds, “From Co-operation to Integration: The Relationship between National and European Competition Law through Judicial Review”, in: O’Keeffe & Bavasso (Eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. I, *Judicial Review in European Union Law* (The Hague/London/Boston, 2000), pp. 570-571, speaking of the Commission as “the privileged forum for competition disputes”. On the initial view of EC competition law as Brussels-based see the groundbreaking article of Forrester and Norall, “The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law Is and Could Be Applied”, 21 CMLRev. 11 (1984), p. 41 *et seq.* The authors had argued for a more active role of national courts in competition enforcement, notwithstanding the then Commission monopoly to grant exemptions. A system of co-operation between the Commission and national courts should ensure consistency and would limit the risk of conflicts. On the centrality of DG IV in competition law enforcement in Europe from a political science point of view see Wilks and McGowan, “Competition Policy in the European Union: Creating a Federal Agency?”, in: Doern & Wilks (Eds.), *Comparative Competition Policy, National Institutions in a Global Market* (Oxford, 1996), p. 245 *et seq.*

⁹⁸ According to the European Courts’ case law Arts. 81(1) and 82 EC enjoy direct effect and grant individuals actionable rights which national courts must protect (*BRT v. SABAM (I)*, *op.cit.*, para. 16).

is certainly far more underdeveloped than in the US.⁹⁹ This is because the whole institutional system of antitrust enforcement in Europe has been fundamentally different because of the overwhelmingly central role of public enforcement. The foundational model of EC competition law centres on administrative decision-making.¹⁰⁰ In the words of Former Advocate General Tesouro the administrative enforcement model in Europe “is proving to be very effective and to some extent an alternative to judicial enforcement. While the protection of private complainants is not the objective of the administrative intervention, the outcome of an antitrust case conducted by the competition authority can be largely equivalent to a judge ruling”.¹⁰¹ To these one should add the fact that administrative authorities and certainly the Commission have extensive investigatory powers and the procedure before them entails no costs for a complainant.¹⁰²

This unprecedented success and the dominant enforcement role acquired by the Commission started being more of a burden for itself in the last two decades and soon it became obvious that the high degree of centralisation of the 1960s was no longer appropriate for the 21st century. As a result, the Commission was now prepared to relinquish some of its powers through the adoption of a modernised enforcement model that is decentralised and relies heavily also upon national courts and competition authorities.¹⁰³

b. Competence of Civil Courts to Apply Articles 81(1),(2) and 82 EC

During the first years of EC competition law enforcement the direct effect of the Treaty competition provisions and the competence of national (civil) courts to apply the latter was not taken as granted. The centralised administrative model introduced by Regulation 17 of 1962 did not certainly help in that respect. It was essentially the Court of Justice that affirmed

⁹⁹ See Jones and Sharpston, *supra* (1996-97), p. 87.

¹⁰⁰ See Gerber, *supra* (1998), p. 386. According to that author “the lack of private suits for enforcement in Community courts and their rarity in Member State courts means that the Commission makes most decisions regarding objectives to be pursued, conduct to be challenged, resources to be used and the arguments to be employed in justifying decisions”. See also in this direction Ehlermann, *supra* (2000a), p. 553; Capelli, “La riforma della disciplina della concorrenza nell’Unione Europea: Impatto sul sistema giudiziario italiano”, (2000) *Il Diritto dell’Economia* 561, p. 566; Birk, “Die Konkurrentenklage im EG-Wettbewerbsrecht”, 14 EWS 159 (2003), pp. 159-160; D.G. Goyder, *EC Competition Law* (Oxford, 2003), p. 460.

¹⁰¹ Tesouro, “Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001, Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 278.

¹⁰² See also Jacobs, “Panel Discussion: EEC Enforcement Policy and Practice”, 54 Antitrust LJ 611 (1985), p. 618 *et seq.*; Venit, *supra* (1987), p. 19.

¹⁰³ In explaining the modernisation initiative of the Commission, former Commissioner Monti stressed the particularly negative consequences of the Commission’s being virtually the sole enforcer of Community competition law in an enlarged Union. See Monti, *supra* (2001), p. 5.

in a line of judgments the direct effect of these provisions and the competence of national courts to apply Articles 81 and 82 EC, though not of the third paragraph of the former, which, under the administrative authorisation system of Regulation 17, was reserved to the Commission's sole jurisdiction.¹⁰⁴

Thus, the Court interpreted Article 9(3) of Regulation 17/1962 in such a way, so that national courts dealing with private law disputes were not to be considered as "authorities of the Member States" in the sense of being devoid of their jurisdiction to apply Articles 81(1) and 82 EC, when the Commission initiated an administrative proceeding. This jurisdiction of national courts resulted of the direct effect of those provisions and could not be limited by Regulation 17.¹⁰⁵ However, the Court progressively curtailed the powers of national courts, when the latter applied Articles 81(1) and 82 EC in parallel with the European Commission.¹⁰⁶ While national courts could continue their proceedings and rule on the agreement or the conduct at issue if the latter manifestly fell or did not fall under the prohibitions of Articles 81(1) and 82 EC, their competence seemed weaker in cases of doubt.¹⁰⁷ Initially, the Court of Justice "invited" national courts to suspend their proceedings, in order to avoid an eventual conflict with the Commission's decision. While it is true that at this point, i.e. so long as the Commission had not yet reached its decision, the national court

¹⁰⁴ Art. 9(1) Reg. 17.

¹⁰⁵ *BRT v. SABAM (I)*, *op.cit.*, paras. 12-20, overruling case 43/69, *Brauerei A. Bilger Söhne GmbH v. Heinrich Jehle and Maria Jehle*, [1970] ECR 127, para. 9. See further C. Grynfogel, *Droit communautaire de la concurrence* (Paris, 1997), p. 52; J. Schapira, G. Le Tallec, J.-B. Blaise and L. Idot, *Droit européen des affaires*, Vol. I (Paris, 1999), pp. 334-335. This case law has not lost all its value under the new system of enforcement, since the provision of Art. 9(3) Reg. 17/1962 is retained by Art. 11(6) of the new Reg. 1/2003 (*see infra*.) Whether national civil (and criminal) courts were excluded from the language of Art. 9(3) Reg. 17 was not always clear. See e.g. P.K. Mailänder, *Zuständigkeit und Entscheidungsfreiheit nationaler Gerichte im EWG-Kartellrecht* (Baden-Baden, 1965), p. 23 *et seq.* The Court in *BRT v. SABAM (I)* distinguished between national courts, where the EC competition issue arose in disputes governed by private law, and courts "especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities" (paras. 14, 15, 19). Only the latter were affected by the letter and spirit of Art. 9(3) Reg. 17 according to the Court.

¹⁰⁶ Under the previous system of enforcement, parallel proceedings in this sense refer to a case pending simultaneously before a civil court and before the Commission, when the latter had either been seized through an application for negative clearance or a complaint, or had initiated an *ex officio* proceeding. If there was no proceeding pending before the Commission, the national court was unfettered in its competence to apply Arts. 81(1), (2) and 82 EC.

¹⁰⁷ *Delimitis*, *op.cit.*, paras. 50-52. Compare also the exact letter of the Court's judgment in case C-250/92, *Gottrup-Klim ea Grovwareforeninger v. Dansk Landbrugs Grovvareselskab AmbA*, [1994] ECR I-5641, para. 58: "If the conditions for application of Article 85(1) [now 81(1)] are clearly not satisfied so that there is scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue" (emphasis added). However, the ECJ's case law indicates that while the competence of national courts remained unfettered only if the conduct in question seemed manifestly legal or illegal pursuant to Art. 81(1) or 82 EC, a stay of proceedings was "invited" even in case of slight doubt. See, in this sense, Korah, "The Judgment in *Delimitis*: A Milestone Towards a realistic Assessment of the Effects of an Agreement - Or a Dump Squib?", 8 Tul.Eur.Civ.LForum 17 (1993), p. 44.

was not, strictly speaking, under a Community law duty to suspend,¹⁰⁸ nevertheless, the Court of Justice gradually used a more stringent language, thus, in essence leading to results comparable to those pertaining to a duty to stay proceedings.¹⁰⁹ This was so, in order to avoid conflicting decisions, which would be against the principle of legal certainty.¹¹⁰

In the recent *Masterfoods* case, which we analyse below, the Court went even further in subjecting national courts to a fully-fledged duty, based on Article 10 EC, not to take decisions “running counter to” decisions of the Commission, in case the Commission has already reached such a decision on the case in question.¹¹¹

c. Competence of Civil Courts to Apply Article 81(3) EC

Contrary to Article 81(1) EC, which had been recognised as directly effective, under the notification and prior authorisation system the Commission had exclusive competence for Article 81(3) EC. Its exemption monopoly was introduced by Article 9(1) of Regulation 17. Notification of restrictive agreements to the Commission, while not obligatory but secured full immunity from administrative fines. The European Court of Justice had also initially

¹⁰⁸ See Jones and Sharpston, *supra* (1996-97), p. 96, stressing that there is no “unconditional obligation to stay national court proceedings while waiting for the Commission to act”. According to these authors, “the national court, in the performance of its duty to decide the case, is entitled to formulate a considered, discretionary judgment about what the Commission is likely to do”.

¹⁰⁹ Compare *BRT v. SABAM (I)*, *op.cit.*, para. 21: “[the] court may, if it considers it necessary for reasons of legal certainty, stay the proceedings”) and case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, [1991] ECR I-935, paras. 47 and 52 *in fine*: “Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) [now 81(1)] and 86 [now 82], and also of Article 85(3) [now 81(3)]. Such conflicting decisions would be contrary to the general principle of legal certainty and *must, therefore, be avoided* when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission... A stay of proceedings or the adoption of interim measures *should* ... be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86 [now 81(1) and 82]” (emphasis added). On the early less absolutist language of the Court in this context see Meade, “Decentralisation in the Implementation of EEC Competition Law - A Challenge for the Lawyers”, 37 NILQ 101 (1986), p. 105; Merola, “La cooperazione tra giudici nazionali e Commissione nell’applicazione delle norme comunitarie antitrust”, 116 *Il Foro Italiano* IV-418 (1993), pp. 421-422.

¹¹⁰ On legal certainty in this context see Basedow, “Rechtssicherheit im europäischen Wirtschaftsrecht - Ein allgemeiner Rechtsgrundsatz im Lichte der wettbewerbsrechtlichen Rechtsprechung”, 4 ZEuP 570 (1996), p. 582. Usually national courts have proved ready to suspend their proceedings in expectation of a Commission decision. In England such a stay of proceedings may take place at any stage of the Commission proceedings, while the court may sometimes prefer not to suspend and proceed to preparatory steps for the eventual trial for so long as these steps do not prejudice the Commission’s decision (see *MTV Europe v. BMG Records (UK) Ltd. et al.*, [1997] EuLR 100). See further on the attitude of English courts with references to case law Cutting, “Competition Law in the United Kingdom”, in: Vogelaa, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. II, *United Kingdom, Ireland, Germany, Austria, Finland, Sweden, Denmark and Greece* (The Hague/Deventer, 2002), pp. 32-33.

¹¹¹ Among other commentaries see in particular Malferrari, “Neues zur Kompetenzverteilung zwischen Kommission und nationaler Gerichtsbarkeit auf dem Gebiet des Wettbewerbs und zum Verhältnis zwischen der Nichtigkeitsklage und dem Vorabentscheidungsverfahren: Anmerkungen zum Urteil des EuGH in der Rechtssache *Masterfoods*”, 36 EuR 605 (2001), pp. 608-610; Kjolbye, 39 CMLRev. 175 (2002), p. 177 *et seq.*

conferred provisional civil validity to all agreements notified to the Commission,¹¹² but later it limited provisional validity only to so-called "old" agreements, i.e. agreements in existence before Regulation 17 came into force.¹¹³

This split in competences, i.e. between the concurrent competence of the Commission and national courts to apply the first paragraph of Article 81 EC and the exclusive competence of the Commission to apply its third paragraph created a rather complicated state of affairs in which the national courts were essentially blocked by the Commission exemption monopoly. The role of national courts was less problematic and their tasks were evident, in case the Commission had already decided whether an agreement fulfilled the conditions of Article 81(3) EC or not, thus respectively granting or denying an individual exemption. If the agreement in question had been granted an individual exemption of constitutive nature, the national court was bound by that the exemption, which was incorporated into an *erga omnes* Community formal legal act that bound the court fully.¹¹⁴ If the Commission had considered that the agreement could not be saved by Article 81(3) EC, the national court under *Delimitis* and ultimately *Masterfoods* would be bound not to contradict the Commission. This duty derived not only from the Commission exemption monopoly but also from Articles 10 and 85 EC (Commission central role in EC competition law enforcement) and from the general principle of legal certainty.

There was a view, aiming at giving the courts a free hand and, thus, at increasing the possibilities of private enforcement, according to which a court should be able to depart from the terms of an individual exemption, if the underlying circumstances had changed.¹¹⁵ A variation of that view is that at least the courts should be able to review the conduct of an undertaking following an exemption.¹¹⁶ However, such views neglected the binding and constitutive nature of the Community act in question and the exclusive competence of the

¹¹² The ECJ did so in *Bosch*, *op.cit.*

¹¹³ Case 48/72, *Brasserie de Haecht v. Oscar Wilkin and Marie Janssen (II)*, [1973] ECR 77.

¹¹⁴ See further Herbert, *supra* (1993), p. I-468; Lang, "Giudice nazionale e Commissione delle Comunità europee: Coesistenza di competenze in materia di concorrenza e strumenti di coordinamento", 32 *Riv.Dir.Int.Priv.Proc.* (1996) 239, p. 246; M. Tavassi and M. Scuffi, *Diritto processuale antitrust, Tutela giurisdizionale della concorrenza* (Milano, 1998), p. 49; C.S. Kerse, *EC Antitrust Procedure* (London, 1998), p. 20; Kamann and Horstkotte, "Kommission versus nationale Gerichte - Kooperation oder Konfrontation im Kartellverfahren: Das *Masterfoods*-Urteil des EuGH im Licht der geplanten Kartellverfahrensverordnung", 51 *WuW* 458 (2001), p. 460.

¹¹⁵ See Jones and Sharpston, *supra* (1996-97), pp. 102-104.

¹¹⁶ See Vaughan, "EC Competition Law in National Proceedings", in Slynn & Pappas (Eds.), *Procedural Aspects of EC Competition Law* (Maastricht, 1995), p. 30. It is not entirely clear if that author's view is only that a national court could review compliance with an exemption granted or whether the court could even "withdraw" the benefit of an exemption.

Commission to produce, amend, and revoke an exemption.¹¹⁷ Therefore, even if circumstances had changed, the issue could only be raised before the Commission, the national court having no other choice but to enforce the exemption or to seize the Court of Justice through an Article 234 EC reference.¹¹⁸

Article 9(1) of Regulation 17 became more of a problem, when the Commission had not yet reached a conclusion in regard of Article 81(3) EC. This meant that the only likely solution, the suspension of national proceedings, would leave the agreement in question in a "twilight zone between validity and nullity" until the Commission's decision.¹¹⁹ However, in *Delimitis*¹²⁰ - and even earlier - it had been accepted that the Commission monopoly should not stand in the way of national courts, if it was clear that Article 81(3) EC could not save the agreement in question. Thus, national courts could apply that provision *negatively*, though not *positively*.¹²¹ In other words, they could not grant an individual exemption themselves, but they could conclude that an exemption was unlikely, thus considering the agreement in question null under Article 81(2) EC.¹²² The same unfettered powers had the national court, if the agreement had not been notified to the Commission, or if the notification had been withdrawn.¹²³

¹¹⁷ See in this sense P.M. Taylor, *EC and UK Competition Law and Compliance: A Practical Guide* (London, 1999), p. 267. Compare also the Commission's Article-by-article Explanatory Memorandum of the September 2000 regulation proposal, under Art. 10.

¹¹⁸ The national court could seize the ECJ with a preliminary reference, if it had doubts as to the legality and validity of the exemption Decision. See Beneyto, "Transforming Competition Law through Subsidiarity?", V(1) *Collected Courses of the Academy of European Law* 267 (1994), p. 294.

¹¹⁹ See Venit, "Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", 40 *CMLRev.* 545 (2003), p. 554.

¹²⁰ *Delimitis*, *op.cit.*, para. 50 *et seq.*

¹²¹ Of course, the national court could take the view that Art. 81(1) EC did not apply in the first place and, thus, decide the case accordingly. See for an example *Cass.com.*, 1-7-03, *SA Sapod Audic v. SA Eco Emballages*, 14(1) *Contr.Conc.Consomm.* 24 (2004).

¹²² Problems could theoretically arise, if the Commission were to take subsequently the opposite view and exempt the agreement. In such a case there would be a conflict between a court judgment and the Commission exemption decision. According to Marengo, "The Uneasy Enforcement of Article 85 EEC as between Community and National Levels", in: Hawk (Ed.), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1994), pp. 619-620, if the national judgment was final and no longer subject to appeal, thus constituting *res judicata*, the parties benefiting from the exemption could institute new proceedings, for example for restitution of damages paid. According to that author, the *res judicata* principle in this case could not pre-empt the precedence due to EC law. On this question see further below.

¹²³ No exemption could be granted in the absence of notification (unless Art. 4(2) Reg. 17 applied), therefore, in case of withdrawal of the notification the full competence of the courts to decide a case on the basis of Art. 81(1) and (2) EC was restored. See e.g. the rejection of two complaints by the Commission in the *Inntrepreneur* saga, where it was thought that following the withdrawal by Inntrepreneur of the notification of its standard leases, there was no longer a Commission interest to deal with the complaints, since the full competence of UK courts to decide the cases was restored. See further Van Erps, "The 'Old' Inntrepreneur Standard UK Pub Leases", (1998-2) *EC Competition Policy Newsletter* 51.

If the agreement infringed Article 81(1) EC and had not been notified, the national judge had no other option but to declare the agreement void. This was an unsatisfactory and unjust characteristic of the old system of enforcement.¹²⁴ Naturally, the parties could always notify the agreement after the beginning of the national proceedings. However, in such a case the eventual exemption would be effective from the date of notification, which meant that the national court could consider the agreement void up to that date and draw civil consequences from that nullity in that period.¹²⁵ If the agreement came to be notified to and exempted by the Commission subsequent to the national court's judgment, then two conflicting decisions would be in existence and the national judgment would still enjoy *res judicata* effect. But this was a purely theoretical hypothesis, since the party relying upon Article 81(3) EC would most likely have rushed to notify the agreement before the end of the civil proceedings in order to seize the Commission and thus block the national proceedings.

On the other hand, in case the national judge was of the opinion that, in the light of the Commission's rules and decision-making practices, the agreement was likely to be the subject of an exemption decision, he should stay the proceedings and/or adopt interim measures pursuant to his national procedural law.¹²⁶ The Court's elliptical pronouncement in this point seemed to leave no other space to the national court for a direct or indirect *positive* application of Article 81(3) EC.¹²⁷

¹²⁴ See Idot and Van de Walle de Ghelke, "Le besoin de sécurité juridique : Notifications et exemptions", 37 CDE 160 (2001), p. 185; D. T. Keeling, *Intellectual Property Rights in EU Law*, Vol. I, *Free Movement and Competition Law* (Oxford, 2003), p. 301.

¹²⁵ Compare, for example, the facts of *MTV Europe*, *op.cit.* See also Jones and Sharpston, *supra* (1996-97), p. 101; Mail-Fouilleul, *supra* (2002), pp. 30-31.

¹²⁶ *Delimitis*, *op.cit.*, para. 52. Again it is our submission that the language of that paragraph seemed to go further than a mere option for the national court to stay proceedings. See *contra* Jones and Sharpston, *supra* (1996-97), p. 98, arguing that national courts should be extremely reluctant to stay proceedings, unless they took the view that an exemption was probable, rather than merely possible. This should particularly be the case, according to these authors, when an Art. 81 EC case combined elements of Art. 82 EC and national law elements, which are not subject to the Commission's exclusive powers.

¹²⁷ The Commission had followed a more liberal approach in its submissions in Case 47/76, *Alexis de Norre and Martine de Norre, née de Clercq v. NV Brouwerij Concordia*, [1977] ECR 65, at 85 and 89, though the Court did not adjudicate on this. The Commission had accepted even the possibility of a *positive* application of Art. 81(3) EC by national courts, recognising that a national judgment upholding the validity of an agreement did not amount to the granting of an exemption in the sense of Art. 81(3) EC, since the judgment would not have *erga omnes* effects and would not be binding on itself. See also the Commission's submissions in cases 253/78 and 1/79 to 3/79, *Procureur de la République v. Giry and Guerlain et al.*, [1980] ECR 2327, at 2345. The Commission returned to this view in a draft notice on co-operation with national courts that was distributed informally in 1990. According to this text, an agreement, whose validity was adjudicated before national courts and which had received a comfort letter from the Commission, would enjoy a "relative validity" as between the parties (see further Beneyto, *supra* (1994), pp. 297-298). In addition, see Kon, "Article 85, Para. 3: A Case for Application by National Courts", 19 CMLRev. 541 (1982) p. 547 *et seq.*; Steindorff, "Article 85, Para. 3: No Case for Application by National Courts", 20 CMLRev. 125 (1983); Greaves, "Concurrent Jurisdiction in EEC Competition Law: When Should a National Court Stay Proceedings?", 8 ECLR 256 (1987), p. 258; Gastinel, "Plaidoyer pour la reconnaissance de l'effet direct à l'article 85, paragraphe 3, du Traité de Rome", D. 1996.53, p. 55. The *Delimitis* judgment put an end to this debate and accepted the possibility only of a *negative*

Finally, under the old system, national courts could control whether any likely conditions accompanying the exemption had been fulfilled by the addressee of the exemption.¹²⁸ If they had not, then the courts could draw the appropriate conclusions.¹²⁹ This meant that the exemption would be considered not valid, thus, the agreement in question would no longer be exempted and would fall under the nullity of Article 81(2) EC. National courts would then be able to draw the civil consequences therefrom.¹³⁰

Notwithstanding these possibilities for national courts, it is true that their competences had been severely impaired as a result of the Commission's exemption monopoly, and, thus, by implication any talk of the development of a more efficient system of private antitrust enforcement in Europe had proved wishful thinking.¹³¹ The problematic state of affairs that the Commission exemption monopoly had created with regard to national courts, had, indeed, led some authors to the view that this exclusive competence, based on secondary law, that is, on Article 9(1) of Regulation 17, was incompatible with the direct effect of Article 81 of the Treaty. Therefore, this specific provision of Regulation 17 should have been considered invalid.¹³²

application of that provision by courts. See, however, V.C. Korah, *Cases and Materials on EC Competition Law* (Oxford, 1997), pp. 161-162, who alludes to a possibility of indirect positive application of Art. 81(3) EC by courts enforcing a restrictive agreement that would likely receive an exemption. According to that author the problem, rather, was the need under Art. 10 EC to avoid possibly conflicting decisions, a risk that in this case would not exist, since the Commission would in any case grant an individual exemption. See also in this direction L. Ortiz Blanco, *European Community Competition Procedure* (Oxford, 1996), pp. 24-25; U. Caspar, *Wettbewerbliche Gesamtwürdigung von Vereinbarungen im Rahmen von Art. 81 Abs. 1 EGV* (Köln/Berlin/Bonn/München, 2001), p. 234, fn. 14.

¹²⁸ National courts, however, could not control the fulfillment of obligations. The latter could only be monitored by the Commission and the only sanction attached to their breach was of administrative nature: the Commission could impose a fine pursuant to Art. 15(2)(b) Reg. 17/1962 or it could revoke or amend the exemption Decision according to Art. 8(3)(b) Reg. 17/1962.

¹²⁹ See Jones and Sharpston, *supra* (1996-97), pp. 103-104.

¹³⁰ This has happened in the *Global One* case in Germany, where the exemption (Commission Decision 96/547/EC of 17 July 1996 (*Phoenix/Global One*), OJ [1996] L 239/57, para. 74 and Art. 1) was subject to a suspensive condition that was not fulfilled. When the parties prematurely enforced their agreement, the national court awarded damages as a result of the ensuing breach of Art. 81(1) EC (OLG Düsseldorf, 16-6-98, *British Telecommunications plc and VLAG Interkom GmbH & Co. v. Deutsche Telekom AG and ATLAS Deutschland*, 48 WuW (1998) 713).

¹³¹ See Cooke, "Centralised Subsidiarity: The Reform of Competition Law Enforcement", 10 IJEL 4 (2001), p. 5.

¹³² See e.g. Ioannou, *supra* (1984), pp. 434, 446, 451; Siragusa, "Future Competition Law - Working Paper V", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998), p. 551, fn. 24. See in this context the preliminary reference to the ECJ made by the *Kammergericht Berlin* in 1997 in case C-34/97, *RWE Energie Aktiengesellschaft and Stadt Nordhorn v. Bundeskartellamt*, OJ [1997] C 94/7, regarding the compatibility with the Treaty of Art. 9 Reg. 17/1962. The argument was that this provision could be incompatible with the "indivisible whole" of Art. 81 EC, since national competition authorities and national courts could apply Art. 81(1) but not Art. 81(3) EC. The case never reached, however, the stage of hearing, because it was withdrawn by the German court and, as a result, was removed from the ECJ register. See further Ehlermann, "Cooperation Between Competition Authorities within the European Union", in: Raffaelli (Ed.), *Antitrust Between EC Law and National Law, Treviso 15-16 May 1997* (Bruxelles/Milano, 1998), pp. 477-481; Wolf, "Entwicklungstendenzen im Verhältnis des nationalen zum

As for the provision in Article 4(2) of Regulation 17 which excluded certain agreements from the obligation to notify, it has had a rather limited impact on the competence of national courts. In any case, this provision did not mean that a limited system of legal exception was recognised, but only that the Commission exemption, whether or not following a voluntary notification,¹³³ applied to those agreements from the date of their entry into force, and not from that of their notification. Regulation 1216/1999 extended the scope of application of Article 4(2) of Regulation 17, thus making it possible for vertical agreements to be exempted retroactively, without the need for precautionary notification.¹³⁴ This means that if a restrictive agreement became an issue in an on-going civil litigation, companies could notify it at any time to the Commission, which could then exempt these retroactively from the date of their entry into force. A problem might have arisen, if the agreement was not notified on time to the Commission or if the Commission had not exempted it *ex officio* before the end of the civil proceedings. In such a case the national court would have no other option but to declare the restrictive clauses void.

In any event, this amendment went in the right direction from the point of view of eliminating bureaucracy but had no particular positive consequences for private antitrust enforcement, in the sense that national courts still lacked competence to apply Article 81(3) EC.

d. The Case of Block Exemptions

The competence of the national judge was resurrected, if an agreement subject to Article 81(1) EC was, nevertheless, exempted through a block exemption regulation. Thus, national courts did have the power to establish whether an agreement fell under a directly applicable block exemption regulation and the duty to safeguard the rights deriving therefrom.¹³⁵ Under the old system of enforcement, if an agreement was caught by Article 81(1) EC and did not benefit from a block exemption, it might still be saved through an individual exemption under

europäischen Wettbewerbsrecht", in: *Schwerpunkte des Kartellrechts 1997, Referate des 25. FIW-Seminars* (Köln/Berlin/Bonn/München, 1998), p. 3 *et seq.*; Miram, "Die dezentrale Anwendung durch das Bundeskartellamt: Länderbericht Deutschland", in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001), pp. 19-20.

¹³³ There has never been a Commission decision exempting a non-notified agreement on the basis of Art. 4(2) Reg. 17. See Ritter, Braun and Rawlinson, *supra* (2000), p. 819, fn. 133.

¹³⁴ Commission Notice - Guidelines on Vertical Restraints, OJ [2000] C 291/1, paras. 63-65.

¹³⁵ Case 63/75, *SA Fonderies Roubaix Wattrelos v. Société Nouvelle des Fonderies A. Roux and Société des Fonderies JOT*, [1976] ECR 111, para. 11; case 59/77, *Établissements A. De Bloos SPRL v. Société en Commandite par Actions Bouyer*, [1977] ECR 2359, para. 17; *Delimitis*, *op.cit.*, para. 46.

Article 81(3) EC; but it should have been or, at worst, be notified to the Commission.¹³⁶ If no individual exemption was possible, the court could only declare it null.¹³⁷

While until recently the Commission produced its block exemption regulations following a legalistic approach, using, apart from black lists, also white lists of clauses, which should be inserted by the parties into their contracts in order to benefit from the exemption, this severely criticised practice has now been reversed.¹³⁸ Starting with the vertical restraints block exemption regulation¹³⁹ the Commission is now using a more economic approach based on market shares and on the economic power of the parties rather than on the legal content of their agreements. These "new generation" block exemption regulations,¹⁴⁰ and, in particular, the fact that they employ market shares, confer new responsibilities on the national judges, who now have to define the market and to determine the position therein of an undertaking.¹⁴¹ This new responsibility, by itself, may, indeed, in a sense hinder private enforcement, since a further obstacle adds to the already existing ones with regard to the judge's non-privileged position in the application of competition law.¹⁴² However, the new economic analysis is something that the Commission, national competition authorities and national courts will have to get accustomed with. Moreover, the more critical and economics-averse instances that entail the withdrawal of a block exemption have always remained the

¹³⁶ Unless the amended Art. 4(2) Reg. 17 applied, again with the limitations described above.

¹³⁷ See *supra*.

¹³⁸ For criticism see among others Venit, *supra* (1987), pp. 36-37.

¹³⁹ Commission Regulation 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, OJ [1999] L 336/21. This Regulation replaced exclusive distribution, exclusive purchasing, and franchising agreements old block exemptions. It is wider in effect but it does not apply to vertical agreements falling under the scope of application technology transfers block exemption Regulation. Whether one or the other Regulation applies may sometimes be a fine issue, depending more on the economic context of the contractual framework, than on the contract itself. See further Subiotto and Amato, "Preliminary Analysis of the Commission's Reform Concerning Vertical Restraints", 23(2) *World Competition* 5 (2000), p. 10, fn. 26.

¹⁴⁰ These are currently the following: Commission Regulation 2658/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements, OJ [2000] L 304/7; Commission Regulation 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, OJ [2000] L 304/3; Commission Regulation 1400/2002 of 31 July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, OJ [2002] L 203/30; Commission Regulation 358/2003 of 27 February 2003 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, OJ [2003] L 53/8; Commission Regulation 772/2004 of 27 April 2004 on the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, OJ [2004] L 123/11.

¹⁴¹ See Lesguillons, "Retrait du bénéfice de l'application du règlement d'exemption restrictions verticales par les autorités compétentes des États-membres", (1999) *RDAl/IBLJ* 509, p. 517; *idem*, "Comment vont s'organiser les décisions de retrait d'exemption?", 4 *Contr. & Impr. (Eur.)* 592 (1999), p. 602.

¹⁴² See, however, Vogelaar, "Modernisation of EC Competition Law, Economy and Horizontal Cooperation between Undertakings", 37 *Intereconomics* 19 (2002), p. 22. It is noteworthy that some of the opponents of modernisation and of the decentralisation of EC competition law enforcement to the level of courts rely exactly upon the new economic approach of the new generation regulations, notices and guidelines, in order to stress the courts' inability to deal with such technical issues. See *infra*.

prerogative of the Commission and, after the entry into force of the new system of enforcement, that of national competition authorities.¹⁴³

e. The Case of Comfort Letters

One very familiar figure of the previous administrative authorisation system was the so-called comfort letters, which constituted the Commission's early response to the heavy burden resulting from the notification of thousands of agreements, which made it impossible to issue formal exemption or prohibition decisions. These administrative letters indicated whether the Commission took a positive or negative view of a notified agreement, but strictly speaking they could not bind national courts. This was certainly a serious weakness, which was criticised by the practitioners' side as a fundamental flaw in the administrative authorisation system and its enforcement by the Commission.

Although comfort letters were non-binding as a result of the fact that they lay outside the scope of Regulation 17/1962¹⁴⁴ and were usually not published, they nevertheless used to offer all the substantive qualities of a negative clearance or an individual exemption decision. According to the Court of Justice, a comfort letter did not bind a national court, but could be taken into account as a factual element.¹⁴⁵ This statement, however, requires some further exploration. While a comfort letter resembling a negative clearance could be taken into account in a meaningful way by the national courts,¹⁴⁶ the same was not true for comfort letters resembling an individual exemption, i.e. administrative letters, where the Commission stated that the agreement in question seemed to fall under Article 81(1) EC, yet it was likely that it would get exempted under Article 81(3) EC. In this specific case it was not evident how a national court could take into account such a statement, since it was deprived of the

¹⁴³ See *infra*. Even under the old system national competition authorities could withdraw the benefit of Reg. 2790/1999 in case of vertical agreements.

¹⁴⁴ See Waelbroeck, "New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?", 11 ELRev. 268 (1986), p. 275.

¹⁴⁵ Case 31/80, *NV L'Oréal and SA L'Oréal v. PIBA "De Nieuwe AMCK"*, [1980] ECR 3775, para. 11; case T-241/97, *Stork Amsterdam BV v. Commission*, [2000] ECR II-309, para. 84. Compare also European Commission, *XXVth Report on Competition Policy - 1999* (Brussels/Luxembourg, 2000), para. 25. See, however, V.C. Korah and D. O'Sullivan, *Distribution Agreements under the EC Competition Rules* (Oxford/Portland, 2002), p. 74, who suggest that the *Delimitis* principles on the obligation of national courts to avoid conflicting decisions may mean that Commission comfort letters were binding on the former. However, this statement is contradicted by the post-*Delimitis* case law of the Court of Justice that confirmed the earlier rulings on the non-binding nature of such administrative letters.

¹⁴⁶ See Ritter, "Automec II: Ein Beitrag des Gerichtshofs zur Subsidiarität?", in: *Schwerpunkte des Kartellrechts 1991/92, Verwaltungs- und Rechtsprechungspraxis, Referate des 20. FIV-Seminars 1992 und der 11. Brüsseler Informationstagung 1992* (Köln/Berlin/Bonn/München, 1993), p. 19.

competence to apply positively Article 81(3) EC either directly or indirectly.¹⁴⁷ The only meaningful way out of this conundrum would have been for the national court to stay proceedings, in order for the parties to seize the Commission anew and request a formal individual exemption decision.¹⁴⁸

Apart from these cases and contrary to formal individual exemption decisions, the national courts were always free to depart from the terms of a comfort letter, if the underlying circumstances had changed. In general, national courts, though not formally bound, have in the majority of cases paid deference to Commission comfort letters,¹⁴⁹ although occasionally there have been instances, where national courts did not take into account comfort letters or encountered difficulties in ascertaining their exact meaning and impact on the facts of the case.¹⁵⁰

As with comfort letters, national courts could not be bound by the non-opposition of the Commission to a notified agreement under the opposition procedure of some of the older generation block exemption regulations and most recently of the previous one on technology transfers.¹⁵¹ Such non-opposition of the Commission might have had the function of an

¹⁴⁷ See above on the similar discussion with regard to the national courts' competence to apply Art. 81(3) EC in a negative or positive way. No problem arose with regard to "discomfort letters" that stated that Art. 81(3) EC would probably not save the agreement in question. The judge would in such cases negatively apply Art. 81(3) EC and declare the agreement's nullity.

¹⁴⁸ See in this sense Siragusa, "Notifications of Agreements in the EEC – To Notify or not to Notify", in: Hawk (Ed.), *United States and Common Market Antitrust Policies 1986, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1987), p. 260; Ritter, *supra* (1993), p. 19; A. Jones and B. Sufrin, *EC Competition Law, Text, Cases, and Materials* (Oxford, 2001), p. 966; G. Tritton, R. Davis, M. Edenborough, J. Graham, S. Malynicz and A. Roughton, *Intellectual Property in Europe* (London, 2002), pp. 890, 932; Korah and O'Sullivan, *supra* (2002), p. 75. However, the authors, who accept the possibility for national courts to positively apply in an indirect way Art. 81(3) EC and to enforce a restrictive agreement that would likely receive an exemption, accept that the judge should proceed in a similar way in case of a comfort letter. See e.g. Caspar, *supra* (2001), p. 234, fn. 14.

¹⁴⁹ See Idot and Van de Walle de Ghelke, *supra* (2001), p. 181; Favre, *supra* (2001b), p. 80, with references to cases, where French courts have treated comfort letters as presumptions of conformity or non-conformity with Community competition law. For a French example see CA Paris, 9-12-92, *Sté Michel Swiss v. Sté Montagne Diffusion*, Juris-Data n° 023825, with a comment by Idot, (1993-2) *Europe* 14. The Commission has also stated that there have not been any decisions by a national authority or court going against a comfort letter (see *Commission Green Paper on Vertical Restraints in EU Competition Policy*, COM(96) 721, January 1997, para. 190).

¹⁵⁰ See e.g. *Inntrepreneur Estates Ltd. v. Mason* (QB), [1993] 2 CMLR 293. In that case the English court ignored the comfort letter that was stating that the notified agreement appeared to fulfill the requirements for an individual exemption, to which the Commission would soon proceed. The court noted that it could, nevertheless, not grant such an individual exemption, since this fell under the Commission's exclusive competence. Instead, it opted for closing the discussion by arguing that the defendants had a real prospect of succeeding in their contention that part of the agreement was void under Art. 81(2) EC. See further Stevens, "The 'Comfort Letter': Old Problems, New Developments", 15 ECLR 81 (1994), p. 86, and for other examples Mail-Fouilleul, *supra* (2002), p. 53, fn. 334.

¹⁵¹ Art. 4 of *Commission Regulation 240/1996 of 31 January 1996 on the Application of Article 85(1) of the Treaty to Certain Categories of Technology Transfer Agreements*, OJ [1996] L 31/2. The Commission had recognised that the opposition procedure had not been a success in practice (see para. 90 of the *Commission*

exemption, but it lay outside the procedural framework of Regulation 17, and, therefore, resembled the comfort letter.¹⁵² In such cases the national court could check whether the agreement in question fell under Regulation 240/1996 and whether it had been duly notified. It could even decide on the legality of clauses that could not be exempted under Articles 1 and 2 of that Regulation and that were not mentioned in the "black list" of Article 3, notwithstanding the fact that the Commission had not rejected such notified clauses under the opposition procedure. On the other hand, if the Commission rejected the specific clauses, then such a decision of the Commission would have been a prohibition decision and, thus, national courts would be bound not to contradict it.¹⁵³

Finally, national courts were and are still not bound by a Commission decision not to investigate a complaint. Indeed, the Commission sometimes decides not to go through the complaint, exactly because the same facts are before a national court.¹⁵⁴ A decision rejecting a complaint has the same legal status with comfort letters and does not bind the national courts, which, however, may take into account the assessments of the Commission made in those decisions as facts.¹⁵⁵ On the other hand, if the Commission, as a result of the complaint, reaches a formal decision as to the applicability or non-applicability of an antitrust prohibition, then again, following *Masterfoods*, such a decision should not be contradicted by the national courts.

f. Competence of Civil Courts in Merger Cases?

While at first sight the enforcement of competition law in mergers appears to fall under the exclusive competence of the Commission or of the national competition authorities based on the "one-stop shop" principle, one cannot exclude that a merger might also be examined by a

Evaluation Report on the Transfer of Technology Block exemption Regulation N° 240/96, Doc. COMP/REG.240/96).

¹⁵² See Siragusa, *supra* (1987), p. 264 *et seq.*; D. Anagnostopoulou and E. Klefodimou, *Know-how Licensing Contracts in Community Law* (Athens/Komotini, 1992) [in Greek], pp. 165-166; Beneyto, *supra* (1994), p. 294.

¹⁵³ See above. If an agreement had been notified to the Commission under the non-opposition procedure of Reg. 240/1996 and the relevant period, in which the Commission had to act, had not yet expired, then the national court should have considered staying proceedings until the expiry of that period. See Tritton, Davis, Edenborough, Graham, Malynicz and Roughton, *supra* (2002), p. 935.

¹⁵⁴ Thus, in *Automec II* the complaint to the Commission had been made, while there was a civil case on appeal pending before the Italian courts (case T-24/90, *op.cit.*, paras. 3, 4, 9, 13, 94).

¹⁵⁵ Case T-575/93, *Casper Koelman v. Commission*, [1996] ECR II-1, paras. 41-43, commented by Idot, (1996-3) *Europe* 9, pp. 9-10.

national court.¹⁵⁶ Since the exclusive competence of the administrative authorities is based on Council Regulation 139/2004,¹⁵⁷ the direct effect of Articles 81 and 82 EC cannot be set aside by secondary legislation.

According to the case law of the Court of Justice, national courts are competent to apply Articles 81 and 82 EC, even if there is no procedural regulation dealing with their implementation. In such a case the legal basis for the application of these provisions will be Articles 84 and 85 EC.

The Court has, however, made a distinction between Article 81 EC and Article 82 EC.¹⁵⁸ The former provision is different from the latter, because it contains a prohibition and an exception rule, if we accept the correct view that Article 83 EC left it to the Community legislator to decide on which system of competition enforcement to opt for, i.e. for administrative authorisation or for legal exception.¹⁵⁹ Article 81(1) EC became directly effective only as a result of the adoption of the implementing legislation of Regulation 17/1962, which had adopted the prior administrative authorisation system. Then Regulation 1/2003 *de facto* extended this direct effect to the third paragraph of that provision by adopting the legal exception system. However both the old and the new Merger Regulations expressly disapply the implementing Regulations to concentrations as defined therein.¹⁶⁰ This means that, on the one hand, Community dimension mergers fall exclusively within the Commission's competence under the Merger Regulation, and there can be no role whatsoever for national courts, because simply the Commission will have applied that Regulation and not Article 81 EC.¹⁶¹ On the other hand, national courts will be able to apply Article 81 EC to non-Community dimension mergers, as far as these produce inter-state trade effects in the

¹⁵⁶ For the view that Reg. 4064/1989 had not affected the direct effect of Arts. 81 and 82 EC see e.g. G. Rounis, *Competition or Cooperation? The Limits of Firms' Activity within the Community Area* (Athens/Komotini, 1992) [in Greek], p. 252 *et seq.*; R. Lane, *EC Competition Law* (Dorchester, 2000), pp. 273-274.

¹⁵⁷ Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation), OJ [2004] L 24/1, repealing Council Regulation 4064/1989 of 21 December 1989 on the Control of Concentrations between Undertakings, OJ [1989] L 395/1, Corrigendum OJ [1990] L 257/14, as had been amended by Reg. 1310/1997, OJ [1997] L 180/1, Corrigendum OJ [1998] L 40/17.

¹⁵⁸ On Art. 81 EC see case 13/61, *Bosch*, *op.cit.*, [1962] ECR 45, at 51-52, and cases 209/84 to 214/84, *Criminal proceedings against Lucas Asjes et al.*, [1986] ECR 1425, paras. 58-69. On Art. 82 EC see case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs et al.*, [1989] ECR 803, paras. 32-33.

¹⁵⁹ See *infra* on this fundamental question.

¹⁶⁰ See Art. 22(1) Reg. 4064/1989 disapplying Reg. 17 and Art. 21(1) Reg. 139/2004 disapplying Reg. 1/2003.

¹⁶¹ If the Commission had applied Art. 81 EC, then according to the *Bosch* principles, the competence of national courts to apply that provision and the Commission's hypothetical Decision would have been "resurrected".

sense of Article 81(1) EC.¹⁶² The question arises whether it must first be necessary for a national competition authority to have already rendered a decision applying that provision to the concentration in question, or whether the national court can directly apply Article 81 EC as a whole. In our view, since Article 21(1) of the new Merger Regulation provides that it will be the only set of rules generally applicable to mergers without making a distinction as to Community or non-Community dimension ones,¹⁶³ it means that the implementing Regulations do not apply to any concentration whatsoever. This resuscitates the enforcement procedures of Articles 84 and 85 EC, as far as sub-threshold mergers are concerned, which means that it will be necessary for a national competition authority to have already applied Article 81 EC to a non-Community merger on the basis of Article 84 EC, before a national court can apply the former provision to the facts of the case in question.¹⁶⁴

Article 82 EC, on the other hand, has always been considered as fully directly applicable by national courts, since it is not subject to any conditions and is not capable of exemptions by means of a balancing of interests. This cannot be affected by secondary Community legislation, such as the Merger Regulation.¹⁶⁵ The application of that provision to mergers has been recognised in the Court's *Continental Can* ruling,¹⁶⁶ where it was accepted that the Treaty applied to structural abuses through a merger, "if an undertaking in a dominant position strengthens its position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one".¹⁶⁷ Therefore, Article 82 EC continues being applicable by national courts to concentrations that may fall thereunder.¹⁶⁸

¹⁶² Note the difference of the two criteria, i.e. the Community dimension of the Merger Regulation and the inter-state trade effect of Arts. 81 and 82 EC. For the possibility to apply Art. 81 EC to a merger see cases 142/84 and 156/84, *British-American Tobacco Company Ltd. and R. J. Reynolds Industries Inc. v. Commission*, [1987] ECR 4487, paras. 36-39, where the Court confirmed that this provision might apply to the acquisition by an undertaking of a minority shareholding in another.

¹⁶³ Art. 21(1) Reg. 139/2004 refers to the Art. 3 definition of a "concentration".

¹⁶⁴ See the interesting and far-reaching views made by Lane, *supra* (2000), p. 274. See further Basedow, "Gemeinschaftsrechtliche Grenzen der Ministererlaubnis in der Fusionskontrolle: Zum Verhältnis des § 42 GWB zu den Art. 81 und 82 EG", 14 EuZW 44 (2003), pp. 49-50.

¹⁶⁵ See with respect to Art. 82 EC, Esteva Mosso and Ryan, "Article 82: Abuse of a Dominant Position", in: Faull & Nikpay (Eds.), *The EC Law of Competition* (Oxford, 1999), p. 187, fn. 232.

¹⁶⁶ Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, [1972] ECR 215, paras. 20-26.

¹⁶⁷ However, Art. 82 EC cannot apply to situations, where a merger creates - and not just strengthens - a dominant position (case T-102/96, *Gencor v. Commission*, [1999] ECR II-753, para. 155). See further on this issue Esteva Mosso and Ryan, *supra* (1999), pp. 186-187.

¹⁶⁸ See Bourgeois and Langeheine, "Jurisdictional Issues: EEC Merger Regulation - Member State Laws and Articles 85-86", in: Hawk (Ed.), *International Mergers and Joint Ventures 1990, Annual Proceedings of the Fordham Corporate Law Institute* (New York/London, 1991), p. 607; Bernini, "Jurisdictional Issues: EEC Merger Regulation - Member State Laws and Articles 85-86", in: Hawk (Ed.), *International Mergers and Joint*

National courts may, in addition, deal with the civil consequences of the prohibition of a merger. Likewise, they may deal with the civil consequences of a merger that has been put into effect without having been notified to the Commission or before having been declared compatible with the common market by a Commission decision. According to Article 7(1) of the Merger Regulation such transactions must be suspended until the Commission either clears the merger pursuant to Articles 6(1)(b), 8(1) or 8(2), or fails to take a decision within the deadlines prescribed by Article 10. If during this period the concentration goes on, then the validity of all relevant agreements that pertain to the merger will be conditional upon the prohibition or clearance of the merger by the Commission. In the first of these two hypotheses these contracts will be null. The nullity involved and other civil consequences will be governed by national law.¹⁶⁹ The breach of a condition to which an authorisation decision is subject, is similar to the situation above.¹⁷⁰

2. The Advent of Modernisation and the Passage to a Legal Exception System

a. The 1999 White Paper and the Reasons that Lay behind it

At the end of April 1999, the Commission embarked on its most important policy change in EC competition law enforcement for the last 40 years by publishing its White Paper on the modernisation of the EC competition law procedural framework.¹⁷¹ This was the first episode in a saga that was certain to lead to a "legal and cultural revolution" in EC antitrust.¹⁷² The

Ventures 1990, Annual Proceedings of the Fordham Corporate Law Institute (New York/ London, 1991), pp. 623-624.

¹⁶⁹ See Liakopoulos, *supra* (2000), p. 576; Ritter, Braun and Rawlinson, *supra* (2000), pp. 519-520, 527; Bos and Struijlaart, "The Netherlands", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003), p. 336, fn. 1. Compare the *Global One* case in Germany: OLG Düsseldorf, 16-6-98, *British Telecommunications and VLAG Interkom v. Deutsche Telekom and ATLAS Deutschland*, *op.cit.*, 48 WuW (1998) 713. In that case the national court awarded damages for breach of Art. 81(1) EC, because parties had enforced their agreement before the conditions in the Commission exemption had been fulfilled.

¹⁷⁰ Though not the breach of an obligation, which has only consequences of administrative nature. On the difference between conditions and obligations and on the legal consequences of their breach, see below.

¹⁷¹ *Commission White Paper of 28 April 1999 on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No 99/027, COM(1999) 101 final, OJ [1999] C 132/1.

¹⁷² See Ehlermann, *supra* (2000a), p. 537 *et seq.*; Nivarra, "Il 'libro bianco sulla modernizzazione delle norme per l'applicazione degli articoli 85 e 86 del Trattato CE': Quale futuro per il diritto europeo della concorrenza?", 3 Eur. & Dir.Priv. 1001 (2000), p. 1009; former Commissioner Monti, "The EU Gets New Competition Powers for the 21st Century", in: *Competition Policy Newsletter, Special Edition 2004*, p. 1. For a retrospective see also Venit, *supra* (2003), p. 545 *et seq.*; Bloom, "The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy", 1 *Competition Policy International* 55 (2005), p. 56 *et seq.* There has been an abundant literature that dealt with most aspects of modernisation. Among others see in particular the contributions by various authors in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), as well as those in: Hawk (Ed.), *International*

White Paper set out to propose a system of antitrust enforcement in the EU for the 21st century, thus marking the end of the "venerable" Regulation 17/1962,¹⁷³ which, as has rightly been pointed out, had existed for so long that it was almost impossible to imagine any other state of affairs.¹⁷⁴ The basic parameters of this proposed system were the abolition of notification and exemption procedures, and the decentralisation of EC competition enforcement by making Article 81(3) EC directly applicable by national competition authorities and national courts. Such decentralisation would extend the possible enforcers of EC competition law, while relieving the Commission of most of the bureaucracy involved in the current system and allowing it to concentrate on the most serious infringements of Articles 81 and 82 EC.¹⁷⁵

The Commission's modernisation plans startled observers of competition law enforcement in Europe, since until very recently it had adamantly defended its Article 81(3) EC exemption monopoly, and had praised the benefits of the exemption monopoly and notification system as late as in 1995 and 1996.¹⁷⁶ While, the notification and administrative authorisation system

Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute (New York, 2000), and in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000). See also Bellis, "Le 'Livre blanc' sur la modernisation des règles d'application des articles 81 et 82 du Traité CE: Un pas décisif vers le démantèlement d'un particularisme européen", 8 JdT (Eur.) 129 (2000); Paulweber, *supra* (2000), p. 3 *et seq.*; Weyer, "Nach der Reform: Gestaltung der Wettbewerbspolitik durch die Kommission?: Zur Anwendung des Art. 81 EGV durch Kommission, nationale Gerichte und EuGH in einem System der gesetzlichen Ausnahme", 164 ZHR 611 (2000).

¹⁷³ The Commission had always been reluctant to consider amending Reg. 17, because it feared opening a "Pandora's Box". The basic fear was that the Council might be tempted to weaken the Commission's ability to enforce the antitrust laws through uninvited amendments. See e.g. McCullough, "The Continuing Search for Greater Certainty: Suggestions for Improving US and EEC Antitrust Clearance Procedures", 6 Nw.Jnt'l L. & Bus. 803 (1984), p. 886. For a retrospective analysis of Regulation 17 from a historical perspective see Hambloch, "Die Entstehung der Verordnung 17 von 1962 im Rahmen der EWG-Wettbewerbspolitik", 37 EuR 877 (2002).

¹⁷⁴ See Doherty, "Community Exemptions in National Law", 15 ECLR 315 (1994). See also the views of the then Director General Claus-Dieter Ehlermann, "Developments in Community Competition Law Procedures", 1(1) *EC Competition Policy Newsletter* 2 (1994), who stressed: "Regulation N° 17 contains all the basic procedural rules for Community competition policy. If and when it is revised, it will only be revised once for the foreseeable future". He took the view that the time for a general amendment of Reg. 17 had not yet come. See further Ehlermann, "Ist die Verordnung Nr. 17 noch zeitgemäß?", 43 WuW 997 (1993); *idem*, "Community Competition Law Procedures", in Slynn & Pappas (Eds.), *Procedural Aspects of EC Competition Law* (Maastricht, 1995), p. 10.

¹⁷⁵ See e.g. Rocca, "L'Europa della concorrenza di fronte alle sfide del nuovo millennio: Le riforme necessarie in materia antitrust", in: Raffaelli (Ed.), *Antitrust between EC Law and National Law, Treviso 13-14 May 1999* (Bruxelles/Milano, 2000), p. 49.

¹⁷⁶ See Van Miert, "Sviluppi e prospettive dell'applicazione decentrata del diritto della concorrenza europeo", in: Autorità garante della concorrenza e del mercato (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995), pp. 141 *et seq.* Four years before the publication of the White Paper the then Commissioner argued that the conditions were not yet ripe for an elimination of the notification system; national competition authorities had not yet acquired sufficient experience, national competition laws were not sufficiently harmonised, and national "exemption decisions" would have to be horizontally recognised throughout Europe, which was politically difficult. Compare also the Commission's *Green Paper on Vertical Restraints in EU Competition Policy*, COM(96) 721, January 1997, para. 28: "The notification system has been successful in providing the Commission with information about the many types of vertical arrangements. It

produced serious discontent,¹⁷⁷ especially because it stood in the way of a more economic-based approach, particularly in the vertical agreements area,¹⁷⁸ the conventional wisdom until 1999 was that the Commission would not really take the initiative to abandon that system. In fact the Commission seems to have started to debate internally the possibility of introducing a legal exception in 1997, immediately after the publication of the Green Paper on vertical agreements and its lukewarm reception by most commentators.¹⁷⁹

Indeed, the treatment of vertical agreements under a more economic-based approach is inextricably connected with the modernisation drive.¹⁸⁰ This problem had always been particularly representative of the EC competition law system's cardinal weakness, the bifurcation between the first and third paragraphs of Article 81 EC. The broad way in which the Commission applied Article 81(1) EC to every agreement that restricted commercial freedom, and the legalistic approach it followed when applying both the first and the third paragraphs of Article 81 EC, were seen as - intentionally or unintentionally - inherent features of the *ancien régime*. While the theory of ordoliberalism offers a partial explanation, it was also commonplace to explain the very broad interpretation of competition restrictions under Article 81(1) EC in terms of the Commission's exemption monopoly. According to this line of thinking, the Commission's central role in EC competition enforcement, coupled with its monopoly to enforce Article 81(3) EC, and the need for uniform application of Article 81

provided the basic material for the Commission to decide on the need for and scope of block exemptions. These block exemptions provide basic legal certainty for the vast bulk of vertical agreements in the EU as well as the advantages of a one-stop-shop. Comfort letters have successfully dealt with any mass problem for cases not already covered by block exemptions." It is also interesting to read para. 185 of the Green Paper: "The notification system provides the Commission with a steady source of information about transactions, including vertical agreements. A substantial portion of the Commission's decisions are triggered by notifications. This indicates that many contractual provisions deserving careful scrutiny have been brought to the Commission's attention through notifications. They also provide the basic material for the Commission to determine the necessity and scope of block exemptions."

¹⁷⁷ See e.g. Siragusa, "Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules", in: Hawk (Ed.), *International Antitrust Law and Policy 1997, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1998), p. 273 *et seq.*

¹⁷⁸ See e.g. Whish, "Panel Three Discussion: Future Competition Law", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998), p. 461.

¹⁷⁹ The 1997 Florence workshop gave the first indications that "Brussels was up to something new". See, in particular, Schaub, "Panel Three Discussion: Future Competition Law", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998), p. 474; Faull, "Panel Three Discussion: Future Competition Law", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998), p. 488.

¹⁸⁰ See also in this direction Gentile, "La svolta di inizio millennio del diritto comunitario della concorrenza: Il nuovo approccio economico, la semplificazione delle norme, la cooperazione internazionale e la modifica del Regolamento 17/62", 5 *Contr. & Impr. (Eur.)* 557 (2000), p. 574. It is not by chance that the Former Director General Ehlermann was already considering in 1995 the possibility to decentralise the application of Art. 81(3) EC with reference to vertical agreements not only to NCAs but also to national courts; see Ehlermann, "Il dibattito sulla sussidiarietà nel diritto della concorrenza", in: *Autorità garante della concorrenza e del mercato* (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995), p. 19.

EC in all Member States required giving a broad interpretation to the first paragraph of Article 81 EC, thus ensuring that the decision as to whether a given restriction was to be accepted, is taken in a uniform manner by the Commission.¹⁸¹

This explains the Commission's hesitations over the introduction of a more economic approach or a "rule of reason" in Article 81(1) EC (as opposed to Article 81(3)), since the "rule of reason" would have led to an indirect transfer of competences from the Commission to national competition authorities and courts.¹⁸² It was also feared that this might lead to the re-nationalisation of competition enforcement in Europe, since agreements benefiting from a "rule of reason" would be granted a negative clearance under Article 81(1) EC rather than an exemption under 81(3) EC, thus inviting the application of stricter national competition law.¹⁸³ It seems the Commission thought that the passage from a legalistic to a more economic approach necessitated a radical overhaul of the procedural rules, moving from notification and exemption to a system of legal exception and self-assessment.

It should be stressed that the objective of modernisation was not merely to decentralise the enforcement of Article 81(3) EC as such to national competition authorities (NCAs) or courts, in the sense that these would authorise restrictive agreements as the Commission had previously done. The reforms went much further: they abolish the authorisation system altogether, thus making Article 81 EC a unitary norm, applicable as a whole by the same enforcer or in the same forum. The decision to adopt a more radical approach, instead of merely decentralising the administrative authorisation system to NCA level, may also be the result of the problems posed by the principle of territoriality governing the effects of national authorities' decisions. It was considered not feasible politically to establish a system which would give Europe-wide effect to exemptions granted nationally, so the only option was to abolish the administrative authorisation system altogether.¹⁸⁴ In addition, the Commission

¹⁸¹ See e.g. Van Houtte, "A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85", 4 *Nw.Jint'IL & Bus.* 497 (1982-1983), p. 509; McCullough, *supra* (1984), p. 892; Waelbroeck, "Antitrust Analysis under Article 85(1) and Article 85(3)", in: Hawk (Ed.), *North American and Common Market Antitrust and Trade Laws 1987, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1988), pp. 693, 696; Todino, "Le norme comunitarie di concorrenza nei poteri dell'Autorità garante della concorrenza e del mercato", 12 *Dir.Comm.Int.* 751 (1998), p. 753; Verouden, "Vertical Agreements and Article 81(3) EC: The Evolving Role of Economic Analysis", 71 *Antitrust LJ* 525 (2003), p. 532 *et seq.*

¹⁸² See e.g. I.E. Soufleros, *Franchising Contracts in Greek Law and in Community Competition Law* (Athens/Komotini, 1989) [in Greek], p. 232 *et seq.*; D'Atorre, "Una 'ragionevole' concorrenza: Il ruolo della 'rule of reason' dopo la riforma del diritto antitrust comunitario", 31 *Giurispr.Comm.* I-80 (2004), p. I-92 *et seq.*

¹⁸³ See Soufleros, *supra* (1989), pp. 234-235. Negative clearances were of merely declaratory nature and had not been interpreted to constitute "positive measures" in the *Walt Wilhem* sense. See below.

¹⁸⁴ See Paulis, "Panel Three Discussion: Decentralisation of Enforcement of Community Law", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997), p.

was hesitant to decentralise such an important tool of competition policy-making, as the individual exemption decision was, since that might lead to NCAs following erratic approaches thus leading to a re-nationalisation of competition law enforcement. It was therefore felt better to abolish the exemption system altogether.

Another parameter that may explain the Commission's rather sudden change of heart is "institutional-political". During the years preceding the publication of the White Paper, the Commission and the then DG-IV in particular, had to deal with a serious threat, namely the German-sponsored proposal to establish a European Cartel Office independent of the Commission.¹⁸⁵ It is true that the proposal failed in the course of the negotiations leading to the Treaty of Amsterdam, but meanwhile it had aroused defensive sentiments in Brussels. From this perspective, the White Paper and the modernisation initiative can be seen as an attempt by the Commission to regain the initiative and continue playing the guiding role in competition law developments in Europe.

b. Modernisation and Decentralisation between Substance and Procedure

The projected reforms were known as the modernisation of EC competition *law*. At this point, some caution is called for; it is more correct to speak of the modernisation of EC competition *enforcement*, rather than law. Indeed, it was not the direct aim of the White Paper or of Regulation 1/2003 to affect substantive competition law as such. Furthermore, if reference is made to the modernisation of EC competition law as a whole, then it is clear that the reform of the old Regulation 17 is only a part of a much more ambitious agenda which has been pursued ever since the Commission published its Green Paper on vertical restraints, followed by the vertical agreements block exemption Regulation. The Commission has also published other "new generation" block exemptions, following a more economic approach and using market shares, a new *de minimis* Notice, a reformed Leniency Notice and Guidelines on horizontal and vertical restraints. Last but not least, the Council recently

100, speaking before the White Paper, but certainly indicating that the Commission was slowly starting to think about adopting the system of legal exception.

¹⁸⁵ On this, now obsolete, debate, see Ehlermann, "Reflections on a European Cartel Office", 32 CMLRev. 471 (1995); *idem*, "Decision Making at the Centre - Working Paper II", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997), p. 36 *et seq.*; Auteri, "Il dibattito su una Autorità antitrust europea", 2 Contr. & Impr. (Eur.) 518 (1997); Carbone and Munari, "Commissione Europa o Autorità indipendente per l'applicazione delle norme comunitarie antitrust?", 2 Contr. & Impr. (Eur.) 533 (1997); Moavero Milanesi, "Spunti intorno all'idea di un'autorità indipendente comunitaria per la tutela della concorrenza", 2 Contr. & Impr. (Eur.) 543 (1997); Rocca, "Concorrenza: Ipotesi di creazione di un'autorità comunitaria indipendente", 2 Contr. & Impr. (Eur.) 549 (1997).

adopted a new Merger Regulation, following the publication by the Commission of a Green Paper.

Admittedly, however, substance and procedure have been intermingled in EC competition law from the outset, with the result that procedural matters have a direct bearing on substance and *vice versa*.¹⁸⁶ As described above, one of the main reasons for the Commission's broad reading of Article 81(1) EC was precisely its exemption monopoly under Article 81(3) EC. By the same token, abolishing the notification and prior authorisation system would possibly also have a certain impact on the substance of EC competition law. The first signs are that the area of that impact might well be the substantive relationship between the first and third paragraphs of Article 81 EC.

With Article 81 EC being enforced as a unitary norm by Community and national enforcers alike, one might argue that any debate as to the bifurcation of antitrust analysis under the first and third paragraphs of Article 81 EC would have only theoretical importance. It might even be submitted that it will no longer matter if Article 81(1) EC is interpreted in such a way that it catches almost all agreements restricting economic freedom without any economic analysis at all, since such an analysis of pro- and anti-competitive effects will follow immediately under Article 81(3) EC, which will now be applied by the same enforcer and in the same forum.¹⁸⁷ Alternatively, Article 81(1) might be applied in such a way as to take all efficiencies and other pro-competitive qualities of an otherwise restrictive agreement into account already at this stage, thus rendering Article 81(3) EC superfluous.¹⁸⁸

Such a simplistic approach, however, ought to be resisted. One question of the utmost practical importance is the burden of proof: while in Article 81(1) EC it is borne by the Commission, in Article 81(3) EC it is borne by the undertakings.¹⁸⁹ If Article 81(1) were to

¹⁸⁶ See e.g. Gerber, *supra* (1998), p. 334 *et seq.*; Garcia Cachafeiro, "El giro norteamericano del derecho antitrust comunitario: El artículo 1 de la Sherman Act", 256 *Revista de Derecho Mercantil* 597 (2005), p. 603.

¹⁸⁷ This seems to be the position of V.C. Korah, *An Introductory Guide to EC Competition Law and Practice* (Oxford/Portland, 2000), pp. 189, 361; Gavalda and Parleani, *supra* (2002), pp. 333-334, 359; A. Albors-Llorens, *EC Competition Law and Policy* (Cullompton/Portland, 2002), p. 72; Korah and O'Sullivan, *supra* (2002), p. 120; Gyselen, "The Substantive Legality Test under Article 81-3 EC Treaty - Revisited in Light of the Commission's Modernization Initiative", in: Von Bogdandy, Mavroidis & Mény (Eds.), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague/London/New York, 2002), p. 197; Goyder, *supra* (2003), pp. 94-95; Venit, *supra* (2003), p. 577. See also Alexiadis and Sullivan, "Vertical Restraints: New Directions in EU Policy", in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003), p. 69. It is interesting to note that the legal exception system in French competition law resulted in a certain attenuation of the prohibition-exemption dichotomy, with the equivalent of Art. 81(3) EC being rarely applied or invoked, while the French competition authority has followed a more global approach based on the rule of reason.

¹⁸⁸ See Toffoletti, "Riforma del diritto antitrust comunitario: Giudizio di esenzione e diritti dei singoli", 29 *Giurisprudenza Commerciale* 417/1 (2002), p. 430/1.

¹⁸⁹ See now Art. 2 Reg. 1/2003.

be given an unqualified meaning, the burden of proof would fall entirely on the parties to the agreement, which would have to prove its pro-competitive effect and its other economic countervailing qualities. On the other hand, if almost all balancing were to take place in Article 81(1) EC, the Commission would be inappropriately burdened. Thus the current division between the two paragraphs reflects a fine balance and apportionment of the burden of proof which it would be unwise to tilt.

In addition, as rightly pointed out, the Treaty itself requires a two-stage reasoning under the two paragraphs.¹⁹⁰ More importantly, if Article 81(1) EC is given too broad a meaning and all economic analysis is conducted only under Article 81(3) EC, there is a risk that the objective and the function of Article 81 EC as a whole will be compromised, since potentially idle agreements, which would have escaped the application of Article 81(1) EC, if a narrower meaning were adopted, might not satisfy the two positive and two negative cumulative conditions of Article 81(3) EC, and end up being prohibited.¹⁹¹ While Article 81(3) EC corresponds in large measure to the US "rule of reason", it is a not very flexible norm. It does not allow for a full benefit but only for a surplus to consumers whereby at least some part of the cost savings must be passed on to the consumers. Thus the effect of the second negative requirement for an agreement not to eliminate competition is that an agreement which creates a monopoly will be prohibited, even if the monopoly is socially desirable because it leads to efficiencies.¹⁹² It should therefore not be excluded that certain agreements which promote competition or efficiency may escape Article 81(1) EC altogether under a reasonableness test, thus being spared the more inflexible competition analysis of Article 81(3) EC.

The reform should therefore not affect the analysis mechanism under Article 81 EC. Perhaps having the modernisation discussions then taking place in mind, the Court of First Instance gave an important ruling in 2001 that clarified the distinction between the first and third paragraphs of Article 81 EC. In *Métropole Télévision*, the CFI, though admitting that an economic-based approach is to a certain degree called for under Article 81(1) EC, took the view that the balancing of pro-competitive and anti-competitive effects, along with the full

¹⁹⁰ See Idot, "A French Point of View on the Radical Decentralisation of the Implementation of Article 81(1) and (3)", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 336.

¹⁹¹ See Wesseling, "The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options", 20 ECLR 420 (1999), p. 423; D.N. Tzouganatos, *Exclusive and Selective Distribution Agreements in Free and Unfair Competition Law* (Athens, 2001) [in Greek], pp. 171-172. See also Verouden, *supra* (2002), p. 573, who refers particularly to vertical agreements, which normally lead to at least some efficiency benefits.

¹⁹² See further on this Gifford and Kudrle, "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?", 48 Antitrust Bull. 727 (2003), pp. 772 *et seq.*

examination of the economic efficiencies accruing from an agreement, should only take place under Article 81(3) EC, as the only provision that could accommodate a “rule of reason” test.¹⁹³ The CFI admitted that Article 81(1) EC was not an inflexible rule, and in fact the Court of Justice’s case law has long made it clear that an agreement must be examined in its legal and economic context, which already entails the need for a certain degree of economic analysis at that stage.¹⁹⁴ However, according to the CFI, this economic analysis should be seen more in the context of “reasonableness” rather than as a full-fledged balancing of pro- and anti-competitive effects. That balancing, together with the full examination of the economic efficiencies accruing from an agreement takes place only in the third paragraph of Article 81 EC. This lends full support to the Commission’s objectives, especially in view of the abolition of the Commission exemption monopoly, and this approach was indeed followed in the Commission Notice on Article 81(3) EC, which is one of the soft law instruments accompanying the new enforcement Regulation.¹⁹⁵

c. The “Legal and Cultural Revolution” of the 1999 White Paper

aa. Is Subsidiarity Relevant?

Decentralisation of Community competition law enforcement did not start with the Commission’s recent modernisation initiative. The Commission had already published two Notices in the 1990’s, one on co-operation with national courts in 1993¹⁹⁶ and another on co-

¹⁹³ Case T-112/99, *Métropole Télévision (M6) et al. v. Commission*, [2001] ECR II-2459, paras. 72-77. Compare also case T-328/03, *O2 (Germany) GmbH & Co. OHG v. Commission*, [2006] ECR II-, para. 69. Some commentators had argued long ago that Art. 81(1) EC in any case could not accommodate a rule of reason approach. See e.g. Whish and Sufrin, “Article 85 and the Rule of Reason”, 7 YEL 1 (1987), p. 23.

¹⁹⁴ Also under the Art. 81(1) EC assessment of agreements falls the application of the ancillary restraints concept, which covers restrictions of competition that are directly related, necessary and proportionate to the implementation of a main non-restrictive transaction (see paras. 28-29 of the Commission’s Notice on Art. 81(3) EC, cited below). On the Art. 81(1) EC case law see in general Korah and O’Sullivan, *supra* (2002), p. 80 *et seq.*

¹⁹⁵ Compare in this respect para. 57 of the White Paper and para. 11 of the recent Notice on Art. 81(3) EC, which are in full accordance with the CFI’s position. See further Vogelaar, *supra* (2002), p. 21; D. Hildebrand, *Economic Analyses of Vertical Agreements – A Self-Assessment* (The Hague, 2005), pp. 25, 45-47. On the question whether Art. 81(3) EC would allow the taking into account of non-competition concerns based on the public interest see Komninos, “Resolution of Conflicts in the Integrated Article 81 EC”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2004, The Relationship Between Competition Law and the (Liberal) Professions* (Oxford/Portland, 2006), p. 451 *et seq.*

¹⁹⁶ *Commission Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty*, OJ [1993] C 39/5. The Notice came in the aftermath of the *Delimitis* and *Automec II* judgments by the ECJ and of the CFI respectively. See Ehlermann, “Anwendung des Gemeinschaftskartellrechts durch Behörden und Gerichte der Mitgliedstaaten”, in: Randelzhofer, Scholz & Wilke (Eds.), *Gedächtnisschrift für Eberhard Grabitz* (München, 1995), pp. 50-51.

operation with national competition authorities in 1997,¹⁹⁷ which indicated an intention to move from centralised to decentralised enforcement of the Treaty competition rules. Such decentralisation gradually became possible, because the *raison d'être* of centralisation, the uniform application of EC competition law in the common market, was no longer an imperative objective for the Community and for the Commission in particular.¹⁹⁸ Member States' adoption of competition laws, most of which replicate the Treaty rules,¹⁹⁹ the attainment of a satisfactory degree of "competition culture" in Europe²⁰⁰ and an increasing sensitivity with regard to the principle of subsidiarity, all help to explain this shift in the dominant approach. However, these instruments were meant to function under the previous system of enforcement, established by Regulation 17/1962.

At this point an important clarification is needed. While many commentators view the decentralisation of EC competition law enforcement as a whole in light of the principle of subsidiarity,²⁰¹ which is also a principle of primary Community law (Article 5(2) EC), we

¹⁹⁷ Commission Notice on Cooperation between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Articles 85 or 86 of the EC Treaty, OJ [1997] C 313/3. That Notice was the result of a long process starting in 1993 with the creation of a Working Group composed by representatives of the Commission and of national competition authorities with the task to make proposals for a more effective application of Arts. 81 and 82 EC by these authorities. The Working Group produced a report, known as the Dubois Report, which formed the basis of a draft notice published in OJ [1996] C 262/7. See further Gaeta, "La comunicazione sulla cooperazione tra la Commissione europea e le autorità antitrust nazionali", 38 Riv.Dir.Eur. 563 (1998), p. 569 *et seq.*

¹⁹⁸ Or, at least less extreme measures - than absolute centralisation - were now thought to be suitable in order to attain this objective.

¹⁹⁹ It is interesting to note that already before Reg. 1/2003 came into force, some of these newly introduced national competition laws contained convergence clauses that made clear that the application of national law should be compatible with the application of Community law by the Commission and by the European Courts. This is the case of s. 60 of the UK Competition Act 1998 (see Middleton, "Harmonisation with Community Law: The Euro Clause", in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000)) and Art. 1(4) of the Italian Competition Act (see Munari, "La legge 10 ottobre 1990 n. 287 e il diritto comunitario della concorrenza", 8 Contr. & Impr. 602 (1992), p. 625 *et seq.*). Compare now also s. 23 of the newly amended German Competition Act (7. *GWB Novelle*). That significant regard should be given to the application of EC competition law is also stressed in the Explanatory Memorandum preceding the Greek Competition Act (L. 703/1977) and in the parliamentary debates leading to the adoption of the old Belgian Act of 5 August 1991 on the Protection of Economic Competition (see Platteau, "Competition Law in Belgium", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. I, EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland (The Hague/Deventer, 2000), p. 499). Reference is also made to the Explanatory Memorandum of the Dutch Competition Act of 1997, which assumes that Dutch competition law should be neither stricter nor more lenient than the EC competition rules (see Van Reeken and Noë, "Competition Law in The Netherlands", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. I, EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland (The Hague/Deventer, 2000), p. 429).

²⁰⁰ On the attainment of a "competition culture" in Europe, see e.g. Tesaro, "The Relationship between the European Commission and the Competition Authorities of the EC Member Countries", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Sechstes St. Galler Internationales Kartellrechtsforum 1999* (Basel/Genf/München, 2000), p. 156; Tizzano, "Intervento", in: Autorità Garante della Concorrenza e del Mercato (Ed.), *Concorrenza e autorità antitrust, Un bilancio a 10 anni dalla Legge, Atti del convegno Roma 9-10 ottobre 2000* (Roma, 2001), p. 209.

²⁰¹ See e.g. Ritter, *supra* (1993), pp. 17-18; Di Via, "L'applicazione del principio di sussidiarietà nel diritto della concorrenza italiano e comunitario", 1 Contr. & Impr. (Eur.) 71 (1996), p. 76; Hinton, "European

prefer to avoid speaking about subsidiarity in this context, for two main reasons. Firstly, in its strictly legislative sense subsidiarity does not apply to the EC competition rules at all, since they concern a matter for which the Community has exclusive competence when the inter-state trade effect criterion is satisfied.²⁰² According to Advocate General Jacobs's Opinion in *Tremblay*, "where Community competition law is applied by national authorities it is clearly not a case of subsidiarity in the sense that the national authorities apply *national law*".²⁰³ A second point to be made is that decentralisation is connected solely with "practicality and efficiency" and thus its aim is rather different from that of subsidiarity.²⁰⁴ In addition, decentralisation as such implies a delegation of competences from the central-Community to the national level. This means that the organ delegating its competences reserves the power to revoke them in appropriate cases.²⁰⁵ On the other hand, subsidiarity in the sense of Article 5(2) EC refers to the allocation of competences between Community and national organs, which is defined pursuant to criteria contained in that Treaty provision itself and operates in an objective and automatic way without any "concession" made by the one or the other organ.²⁰⁶

Community Competition Law, Subsidiarity, and the National Courts", 11 *BYU JPub.L* 301 (1997), pp. 311-312; Ritter, Braun and Rawlinson, *supra* (2000), p. 66; Savy, "La leale cooperazione nella disciplina antitrust e nel nuovo Regolamento CE n. 1/2003 del Consiglio", 5 *Dir.Publ.Comp.Eur.* 913 (2003), pp. 914-915.

²⁰² See e.g. Stuyck, "Competition Law in the EC and in the Member States", in: Due, Lutter & Schwarze (Eds.), *Festschrift für Ulrich Everling*, Vol. II (Baden-Baden, 1995), p. 1515; Temple Lang, "Rapport général", in: *XVIII congrès FIDE* (Stockholm, 3-6 juin 1998), Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 280; E. Putman, *Contentieux économique* (Paris, 1998), p. 386; Idot, in: (2001-7/8) *Rev.Conc.Consomm.* 24.

²⁰³ Case C-91/95, *Roger Tremblay, Harry Kestenberg and Syndicat des Exploitants de Lieux de Loisirs (SELL) v. Commission*, [1996] ECR I-5547. The AG thought it "more appropriate to refer to decentralization rather than subsidiarity", though he recognised that "in practice however the distinction may be less clear, since national authorities may be applying both Community and national competition rules" (para. 20 of the Opinion).

²⁰⁴ See Louis, "Ensuring Compliance and Implementation by Member States", in: Buxbaum, Hertig *et al.* (Eds.), *European Economic and Business Law, Legal and Economic Analyses on Integration and Harmonization* (Berlin/New York, 1996), p. 49.

²⁰⁵ This is exactly the case under the new Regulation, according to which (Art. 11(6)) the Commission can always initiate proceedings, thus relieving NCAs of their competence. See *infra*.

²⁰⁶ See Tizzano, "L'applicazione decentrata degli articoli 85 e 86 del Trattato CE in Italia", in: Autorità garante della concorrenza e del mercato (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995), p. 116; Mavroidis and Neven, "The White Paper: A Whiter Shade of Pale of Interests, and Interests", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 208, 210-211. See also Rodger, "Interrelationship with Community Competition Law Enforcement", in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000), p. 68, who clearly distinguishes between decentralisation and subsidiarity and would have preferred a system based on subsidiarity that would have allowed for greater scope to national competition laws.

The term "subsidiarity" can therefore only be used in a general and non-technical sense,²⁰⁷ and Commission references to that principle should only be viewed in that sense, although it is difficult to detect coherence in Commission officials' views as to this issue. Indeed, the Commission recently seems to have preferred to speak of "bringing the application of Community competition rules closer to citizens and undertakings" (*Bürger näh*).²⁰⁸ This objective is also enshrined in Article 1(2) TEU, which refers to decisions taken as closely as possible to the citizen.²⁰⁹ In that sense the aims of the decentralisation of EC competition enforcement are quite similar to the aims behind subsidiarity,²¹⁰ although technically speaking, Article 5(2) EC does not apply to EC competition law enforcement as such.²¹¹

bb. The Compatibility of the New System with the Treaty

After this *excursus*, some explanation should be given as to the White Paper's revolutionary qualities. These derive from its advocacy of what was previously unthinkable: passing from a system of administrative prior authorisation to one of legal exception.²¹² In an administrative authorisation system the basic prohibition of Article 81(1) EC can be lifted only by the act of a public authority, which is constitutive in nature. In a legal exception system, on the other

²⁰⁷ See Tizzano, *supra* (1995), p. 115; Canenbley, "Decentralisation of Enforcement of Community Law - Working Paper IV", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997), p. 146; Kunzlik, "Globalization and Hybridization in Antitrust Enforcement: European 'Borrowings' from the US Approach", 48 *Antitrust Bull.* 319 (2003), pp. 328-329. See Idot, "Les règles applicables aux entreprises", 8 *RAE/LEA* (1998) 114, p. 115, describing subsidiarity in this context as "administrative"; Ehlermann, "The Evolution in Relations between the EC Commission and National Antitrust Authorities", in: *Antitrust fra diritto nazionale e diritto comunitario, Atti del II convegno di Treviso (5-6 Maggio 1995)* (Milano, 1996), p. 58, distinguishing between "subsidiarity in the legislative process" and "subsidiarity in the area of implementation"; Lucas de Leyssac and Parleani, *supra* (2002), p. 57, distinguishing between these two facets of "subsidiarity".

²⁰⁸ See e.g. Schaub, "Die Reform der Europäischen Wettbewerbspolitik", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Achtes St. Galler Internationales Kartellrechtsforum 2001* (Basel/Genf/München, 2002), p. 7; Tizzano, *supra* (2001), p. 210; Schaub, "Developments of European Competition Law", in: Hellenic Competition Committee (Ed.), *EU Competition Law and Policy, Developments and Priorities, Athens Conference, April 19th 2002* (Athens, 2002), p. 104. On the general principle of the close-to-the-citizen application of Community law (*Bürger näh*) see e.g. Callies, "Europa als Wertgemeinschaft - Integration und Identität durch europäisches Verfassungsrecht?", 59 *JZ* 1033 (2004), p. 1035.

²⁰⁹ See Schröter, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), p. 48.

²¹⁰ See Tesauro, *supra* (2000b), p. 160.

²¹¹ See also Bourgeois, "Enforcement of EC Competition Law by National Authorities: Square Pegs in Round Holes", in Gormley (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997), pp. 93-95, who stresses that even if the principle of subsidiarity does not apply to EC competition law enforcement and the EC is not required to leave it to Member States to apply that law, notably to exempt restrictive agreements (still subject to the Commission monopoly at the time), this does not exclude that the EC may lawfully delegate the exercise of such powers to the Member States. This is exactly what the new decentralised system of enforcement entails.

²¹² See Ehlermann, *supra* (2000a), p. 537 *et seq.*

hand, the prohibition is applied to a specific agreement by virtue of the law itself, i.e. through the direct application of Article 81(3) EC, without the need for a prior administrative decision. In this case, a decision not to apply the prohibition is merely declaratory in nature. In other words, Article 81(3) EC would become a directly applicable provision. In consequence, agreements which fell under Article 81(1) EC but also fulfilled the conditions of Article 81(3) EC would be considered lawful and fully enforceable without the need for any prior authorisation, be it administrative or judicial. On the other hand, agreements falling under the first paragraph of Article 81 EC without fulfilling the conditions of the third paragraph of that provision, would be prohibited and void *ab initio*, again without the need of a prior administrative or judicial intervention.

The reform advocated by the White Paper gave rise to long, sometimes spirited but ultimately fruitful debates between competition lawyers in Europe and beyond. Most negative reactions, which came mainly from German commentators,²¹³ centred on the proposed reform's compatibility with the Treaty, the efficiency of the modernised system of enforcement, questions of legal security for undertakings, and the coherence of enforcement as between the Community and the national levels.

With regard to the debate on compatibility, an initial argument against the reforms was that by referring to a "declaration" that Article 81(1) EC did not apply, the letter of Article 81(3) EC presupposed the intervention of an administrative authority.²¹⁴ A legal exception system would therefore not be compatible with the Treaty of Rome. Opponents of the reform also stressed that Article 81(3) EC entails complex economic assessments, and therefore implies

²¹³ See e.g. Mestmäcker, "Versuch einer kartellpolitischen Wende in der EU", 10 EuZW 523 (1999); Deringer, "Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)", 11 EuZW 5 (2000); Möschel, "Systemwechsel im Europäischen Wettbewerbsrecht?", 55 JZ 61 (2000); *idem*, "Guest Editorial: Change of Policy in European Competition Law?", 37 CMLRev. 495 (2000); Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Technologie, *Gutachten von 1-7-00 über die Reform der europäischen Kartellpolitik*, 50 WuW 1096 (2000), in English in: http://www.bmwi.de/Homepage/download/english/doku480_E.pdf. See also Lever, "The German Monopolies Commission's Report on Problems Consequent upon the Reform of the European Cartel Procedures", 23 ECLR 321 (2002).

²¹⁴ See Mestmäcker, *supra* (1999), p. 525 *et seq.*; Wesseling, *supra* (1999), p. 425; Paulweber and Kögel, "Das europäische Wettbewerbsrecht am Scheideweg: Die Reformvorhaben der Kommission zur Modernisierung des europäischen Kartellverfahrensrechts in der Kritik", 44 AG 500 (1999), p. 506; Deringer, *supra* (2000), p. 6; Möschel, *supra* (2000a), p. 62; Paulweber, *supra* (2000), p. 30; Wißmann, "Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999", 23(2) *World Competition* 123 (2000), p. 139; Mestmäcker, *supra* (2001), p. 229 *et seq.*; Stillfried and Stockenhuber, "Der Entwurf einer neuen Verfahrensverordnung zum EG-Kartellrecht", 15 WBl. 145 (2001), p. 150; Meli, "Il progetto di modernizzazione del sistema di controllo delle intese anticoncorrenziali ed il ruolo del giudice ordinario", 4 Eur. & Dir.Priv. 117 (2002), p. 121.

wide discretionary powers²¹⁵ to which national courts in particular are not accustomed.²¹⁶ This line of argument called into question the direct effect of Article 81(3) EC,²¹⁷ as being not clear, unambiguous or sufficiently unconditional, in order to meet the test of the Court of Justice's case law.²¹⁸

Another connected issue was the fate of block exemption regulations, which would continue to exist under the new system. However, according to opponents of the reform, block exemptions would not by the very nature be compatible with a legal exception system.²¹⁹ At most these regulations would have the characteristics of "block negative clearances" and be of a declaratory nature.²²⁰ Indeed, some authors go as far as arguing that block exemption

²¹⁵ See Möschel, *supra* (2000a), p. 62; Odudu, "Article 81(3), Discretion and Direct Effect", 23 ECLR 17 (2002), p. 21.

²¹⁶ In this context reference has been made to ECJ judgments stressing this particularity of Art. 81(3) EC. See e.g. *Delimitis, op.cit.*, para. 44: "It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The performance of that task necessarily entails complex economic assessments, in particular in order to assess whether an agreement falls under Article [81(3)]". See further case T-131/99, *Michael Hamilton Shaw and Timothy John Falla v. Commission*, [2002] ECR II-, para. 38. On the judges' perceived inability to deal with such complicated issues see e.g. P. Lässig, *Dezentrale Anwendung des Europäischen Kartellrechts* (Köln/Berlin/Bonn/München, 1997), p. 35; Topel, "Kohärenz der dezentralen Anwendung im System paralleler Kompetenzen", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition>, p. 3 *et seq.*; Möschel, "Effizienter Wettbewerbsschutz in einer erweiterten Gemeinschaft durch Einbeziehung der nationalen Wettbewerbsbehörden und nationalen Gerichte?", 51 WuW 147 (2001), p. 148; Bovis, "Transforming the Application of EC Competition Laws: The Case of Decentralisation", 12 EBLR 98 (2001), p. 100; Pace, "La politica di decentramento del diritto antitrust CE come principio organizzatore del regolamento 1/2003: Luci ed ombre del nuovo regolamento di applicazione degli artt. 81 e 82 TCE", 14 Riv.It.Dir.Publ.Com. 147 (2004), p. 178 *et seq.* See also Gustafsson, *supra* (2000), p. 175; Martinez Lage and Brokelmann, "Article 81(3) before National Courts: The *CAMPSA* Doctrine of the Spanish Supreme Court and Articles 84 and 85 Revisited", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 600, 608-612, supporting the rather extreme position to exclude civil courts from applying competition law altogether in the absence of a pre-existing decision of a competition authority.

²¹⁷ Mestmäcker, *supra* (1999), p. 526; Wißmann, *supra* (2000), p. 140; Mestmäcker, *supra* (2001), p. 231. Mestmäcker also argued that if Art. 81(3) EC could not satisfy the conditions of direct effect, tying Art. 81(1) to 81(3) EC - through the new Regulation - would deprive the former of the two provisions of direct effect (see *idem, supra* (2000), p. 417; Paulweber, *supra* (2000), p. 32). See also Caspar, *supra* (2001), p. 247, according to whom the problem with the application of Art. 81(3) EC by national courts is not its justiciability. Art. 81(3) EC is justiciable. However, according to that view, civil courts are not an appropriate forum because of the policy character of this provision and of the balancing that it entails among competition and non-competition concerns. See, in particular, Odudu, *supra* (2002), p. 23.

²¹⁸ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1, at 13. It is interesting to trace back the views of Deringer at the time when Reg. 17 entered into force. That author was of the opinion that Art. 81(3) of the Treaty is a discretionary provision and not a legal exception, therefore, a declaration based on this rule is a normative activity, belonging within the realm of administration and not that of courts. He goes on to say, however, that "even if the Commission had not been given exclusive jurisdiction [by means of Reg. 17], the national courts could only apply Article [81(3)] if this power had been specifically conferred upon them" (see Deringer, *supra* (1963-64), p. 34, fn. 4, emphasis added).

²¹⁹ Mestmäcker, *supra* (1999), p. 526; Gentile, *supra* (2000), pp. 607-608; Wißmann, *supra* (2000), p. 142.

²²⁰ See e.g. Müller-Tautphacus, "Das Weissbuch der Kommission zur Modernisierung der Anwendungsregeln zu Art. 81, 82 EGV: Der Gegenwärtige Diskussionsstand", 72 SZWR/RSDA 149 (2000), p. 154; Bartosch, "Von der Freistellung zur Legalausnahme: Was geschieht mit der Rechtssicherheit?", 50 WuW 462 (2000), p. 467; Bechtold, "EG-Gruppenfreistellungsverordnungen: Eine Zwischenbilanz", 12 EWS 49

regulations have no binding effect because of their declaratory nature and also because they are secondary law whereas Article 81(3) EC under the legal exception system necessitates no intermediary and is thus itself applicable irrespective of the relevant block exemption regulation.

A more serious argument against the reform's compatibility with the Treaty was that because there would no longer be an *a priori* presumption that restrictive agreements were illegal pending a decision by an administrative authority or a court, the effectiveness of the prohibition principle followed by the Treaty with regard to agreements (as opposed to the abuse principle applicable to monopolies), would be impaired.²²¹ Thus, it was argued that there would be a presumption that anti-competitive agreements were valid, which would resemble, if not amount to, the abuse system.²²²

In reply to this line of criticism, the majority of authors believe that the text of Article 81 EC is at least neutral and thus capable of accommodating secondary legislation opting for the authorisation or the legal exception system.²²³ These authors point out that Article 81 EC was

(2001), p. 54. See also Deringer, *supra* (2000), p. 7, who also questions the nature of the act of withdrawal by a public authority of the benefit of a block exemption. According to this author such an act can only be declaratory under a legal exception system.

²²¹ In the prohibition system, adopted under Art. 81 EC, the law prohibits the *existence* itself of an agreement or concerted practice, while behaviour, as such, is in principle immaterial. On the other hand, in the abuse system, adopted under Art. 82 EC, it is not the existence of a dominant position as such, but only its *abuse*, that is prohibited. The prohibition system is generally acknowledged to be a more efficient system with regard to cartels. To complete the picture, we should add that there are four models of regulation or non-regulation of economic activities: (a) the laissez-faire model, (b) the system of control of abuse, (c) the prohibition system, and (d) the state ownership model. See further I. Brinker, *Mißbrauchsaufsicht auf der Grundlage der Gruppenfreistellungsverordnungen, Die Bedeutung des Widerrufsrechts der EG-Kommission im Rahmen der Gruppenfreistellungsverordnungen nach Artikel 85 Absatz 3 EG-Vertrag*, Dissertation, Ludwig-Maximilians-Universität München (München, 1994), p. 9.

²²² See Mestmäcker, *supra* (1999), p. 528; *idem*, "Begrenzt abschreckend", Kommentar, 50(7-8) WuW (2000); *idem*, *supra* (2000), p. 411; Möschel, *supra* (2000a), p. 66; Paulweber, *supra* (2000), pp. 40-41; Wißmann, *supra* (2000), p. 140; Rittner, "Diskussionsbeitrag - Wandel des Europäischen Wettbewerbsrechts", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001), p. 44; Mestmäcker, *supra* (2001), pp. 224-226; Schröter, *supra* (2003), p. 200. It should be noted that sometimes the criticism that EC competition law is moving towards an abuse system is also heard with regard to other broader reforms, such as the new policy on vertical restraints. According to this view, the fact that vertical agreements exceeding the market share caps, which have not been notified or have been notified late, still can be exempted *ex tunc*, seems to be not entirely in conformity with the prohibition system. See further Paulweber and Kögel, *supra* (1999), p. 508; Bayreuther, "Die Reform der EG-Wettbewerbspolitik gegenüber vertikalen Wettbewerbsbeschränkungen", 11 EWS 106 (2000), p. 109; Fuchs, "Die Modernisierung des europäischen Kartellrechts im Bereich vertikaler Vereinbarungen", in: Schwintowski (Ed.), *Entwicklungen im deutschen und europäischen Wirtschaftsrecht, Symposium zum 65. Geburtstag von Ulrich Immenga* (Baden-Baden, 2001), p. 118.

²²³ That the modernisation proposals were compatible with the Treaty was the overall conclusion in the 5th Annual EC Competition Law and Policy Workshop, held at the Robert Schuman Centre of the European University Institute in Florence. This was also the point of view expressed in the interventions and contributions of all former and current judges of Community Courts. See e.g. Tesauro, *supra* (2001), p. 262 *et seq.* In addition, both Forrester and Marengo, who undertook to do research on the historical context of the drafting of Article 81 concluded that the Treaty left open the choice between an authorisation and a legal exception system. See Forrester, "The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust*

a compromise between a system of administrative authorisation, initially favoured by Germany, and the French-sponsored legal exception system.²²⁴ An argument in favour of the Treaty's open-endedness can also be adduced from the text accompanying the word "declare" in Article 81(3) EC. While this verb may at first sight lend some weight to the view that the authorisation system is Treaty-based, it can be argued to the contrary that if the Treaty had intended this, it would also have specified the author of the authorisation, i.e. the Commission, rather than stopping there.²²⁵ The incompleteness should therefore be taken as meaning that the whole matter was left to secondary legislation.²²⁶

With regard to the economic complexity inherent in Article 81(3) EC, the counter-argument is that this point is equally valid for Article 81(1) EC,²²⁷ as well as for Articles 82 and 86 EC.²²⁸ Competition law in general is characterised by complexity. The definition of the relevant market, the cumulative effect of networks of agreements, and the appreciability of restraints on competition, are all complicated fact-averse elements which require demanding treatment by judges.²²⁹ In particular, Article 82 EC is usually more difficult to apply than Article 81(3) EC.²³⁰ Other authors stress the parallels to be drawn from the directly effective

Policy (Oxford/Portland, 2001), p. 75 *et seq.*; Marengo, *supra* (2001a), p. 145 *et seq.* See also for an exposé of the historical context Marengo, "Le régime de l'exception légale et sa compatibilité avec le Traité", 37 CDE 135 (2001), p. 136 *et seq.*

²²⁴ Wils, "Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis", 24 ELRev. 139 (1999), p. 155; Idot, "La révision du règlement 17/62 ou l'ouverture de la 'boîte de Pandore'", (1999-8/9) *Europe* 3; R. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford/Portland, 2000), p. 20. On the compromise solution attained with Reg. 17/1962 see also Marengo, *supra* (1994), pp. 626-627; Braun, "Deutschland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. III, *Germany* (Baden-Baden, 1996), p. 417; Lane, *supra* (2000), p. 114; Appeldoorn, "Are the Proposed Changes Compatible with Article 81(3) EC?", 22 ECLR 400 (2001), p. 401; Schröter, *supra* (2003), p. 331; Goyder, *supra* (2003), p. 26. Compare also Brinker, *supra* (1994), pp. 33-38.

²²⁵ As was the case with Art. 65 ECSC.

²²⁶ See Ehlermann, *supra* (2000a), p. 539; Marengo, *supra* (2001b), p. 139; Calvo Caravaca and Canedo Arrillaga, "Libre competencia y descentralización", 2(1) Rev.Esp.Der.Eur. 5 (2003), p. 27, fn. 54.

²²⁷ Compare with regard to Art. 81(1) EC case T-65/98, *Van den Bergh Foods Ltd. v. Commission*, [2003] ECR II-4653, para. 80: "Judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers".

²²⁸ See Nehl, "Changes in Legislation: Constitutional Reform and the Role of the Administrator", in: *The Modernisation of EC Competition Law: The Next Ten Years*, CELS Occasional Paper, No. 4 (Cambridge, 2000), p. 15; Whish and Sufrin, "Community Competition Law: Notification and Individual Exemption - Goodbye to All That", in: Hayton (Ed.), *Law's Future(s)* (Oxford/Portland, 2000), p. 145; Gyselen, *supra* (2002), p. 183 *et seq.*; Schaub, "Continued Focus on Reform: Recent Developments in EC Competition Policy", in: Hawk (Ed.), *International Antitrust Law and Policy 2001, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2002), p. 45.

²²⁹ K.L. Ritter, D.W. Braun and F. Rawlinson, *European Competition Law: A Practitioner's Guide, Website Supplement, Update January 2003*, in: <http://www.kluwerlaw.com>, p. 8, fn. 22.

²³⁰ See e.g. Temple Lang, "Decentralised Application of Community Competition Law", in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000), p. 24; Burrichter, "The Application of Article 81(3) by National Courts: Some Remarks from the Point of

free movement rules of the Treaty (Articles 28 to 30 EC), which also involve complex issues and presuppose a balancing act.²³¹ Indeed, the fears expressed with regard to judges' ability or inability to apply Article 81(3) EC do not do them justice, since in their own legal traditions they deal constantly with complicated legal and economic policy-connected problems. Even accepting that there is something special or "different" about the third as opposed to the first paragraph of Article 81 EC,²³² there is still no compelling reason why courts cannot adjudicate such "special" issues.²³³ Furthermore, EC competition law should not be seen as an unconnected *aliud* with respect to general Community law. Unlike US antitrust or EU Member States' national competition laws, the Community competition provisions are enshrined in the EC Treaty, thus enjoying constitutional status. Thus, interestingly enough, modernisation should be seen in the context of general Community law, and should not be perceived as a revolution but rather as a return to the norm.²³⁴

Supporters of the reform stressed in addition that the margin of discretion the Commission enjoyed under Article 81(3) EC never meant that it had the power to refuse an exemption to an undertaking if all four conditions of Article 81(3) EC were fulfilled, or that it could grant an exemption if the four conditions were not met. On the contrary, undertakings had a *right* to have their agreements exempted if those conditions were fulfilled.²³⁵ It was also argued that

View of a Practitioner", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 539.

²³¹ See e.g. Ehlermann, *supra* (2000a), p. 558; Tesauro, *supra* (2000a), p. 10; Whish and Sufrin, *supra* (2000), p. 145.

²³² See the contributions of Cooke, "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" and of Whish, "National Courts and the White Paper: A Commentary", in: *The Modernisation of EC Competition Law: The Next Ten Years*, CELS Occasional Paper, No. 4 (Cambridge, 2000), p. 62 and p. 75 respectively.

²³³ See e.g. Schaub, "Das Europäische Kartellrecht im Jahr 2000", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Siebentes St. Galler Internationales Kartellrechtsforum 2000* (Basel/Genf/München, 2000), p. 14; Müller-Tautphacus, *supra* (2000), p. 155.

²³⁴ See Tesauro, *supra* (2000b), p. 164; Ehlermann, *supra* (2000a), pp. 576-577; Tesauro, *supra* (2001), pp. 263-264; Schaub, "The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 243-244; Fox, "Modernisation: Efficiency, Dynamic Efficiency, and the Diffusion of Competition Law", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 127-128; Paulis, *supra* (2001a), pp. 401-402; *contra* Martinez Lage and Brokelmann, *supra* (2001), pp. 598-599. Compare the view of Former AG Van Gerven, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 19, who stresses that a Treaty provision that was not originally directly applicable can become so over time because of the precision given to it by subsequent case law.

²³⁵ See Schaub and Dohms, "Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag: Die Reform der Verordnung Nr. 17", 49 WuW 1055 (1999), p. 1064; Marengo, *supra* (2001b), p. 143; Schaub, *supra* (2001a), p. 246; Wils, "The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute*

the review of Article 81(3) EC Commission Decisions exercised in practice by the Community Courts may not be as reserved as many suppose: indeed, it perhaps does not differ from the review of Commission Decisions under Articles 81(1), 82 and 86(2) EC.²³⁶

Under the new system, block exemption regulations remain the backbone of EC competition policy-making.²³⁷ They are essentially acts that apply Article 81(3) to categories of agreements, thus "circumscribing a portion of the field where Article 81 is not applicable".²³⁸ They constitute hard law Community legal prescriptions, which guarantee legal certainty²³⁹ and the correct and consistent application of Article 81(3) EC by national authorities and courts and thus reduce the risk that competition law enforcement in Europe will be re-nationalised.²⁴⁰ National courts will go on applying them²⁴¹ and will not have the power to

(New York, 2001), p. 329; Hirsch, "Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte", 1 ZWeR 233 (2003), pp. 237-239. Interestingly enough, earlier statements of Commission officials seem to go to the opposite direction (see e.g. Paulis, "Decentralisation of Enforcement of Community Law - Working Paper VII", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997), p. 201.

²³⁶ See Marengo, *supra* (2001a), pp. 165-167; Wils, *supra* (2001), pp. 329-330; Gyselen, *supra* (2002), p. 191. See also Ehlermann and Atanasiu, "The Modernization of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts", 23 ECLR 72 (2002), pp. 74-75, who stress that the passage to a system of legal exception will eliminate the Community Courts' self-imposed limited control over Commission decisions applying Art. 81(3) EC, to the extent that such a limit exists, and Art. 81(3) enforcement will now be subject to a normal standard of judicial review. This point is now shared by Montag and Janssens, "Article 81(3) in the Context of Modernisation - A Lawyer's View", in: Geradin (Ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerp/Oxford, 2004), p. 232.

²³⁷ See Bellis, *supra* (2000), p. 133.

²³⁸ Marengo, *supra* (2001a), p. 173; Lenaerts, "Modernisation of the Application and Enforcement of European Competition Law: An Introductory Overview", in: Stuyck & Gilliams (Eds.), *Modernisation of European Competition Law, The Commission's Proposal for a New Regulation Implementing Articles 81 and 82 EC* (Antwerp/Oxford/New York, 2002), p. 17. See also the arguments of the Former Director-General Schaub, *supra* (2001a), p. 247, according to whom it is not incompatible with the Treaty to give a declaratory nature to individual applications of Art. 81(3) EC while maintaining a constitutive nature for block exemption regulations, which are binding and directly binding Community acts pursuant to Art. 249 EC. On another occasion the former Director General stressed that these block exemption regulations should not be considered as legislation (*Gesetzgebung*) but rather as application of the law (*Rechtsanwendung*) (Schaub, *supra* (2002a), p. 8). See also Paulis, "Latest Commission Thinking and Progress on the Modernisation of Regulation 17", in: *European Competition Law: A New Role for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers* (Bruxelles, 2001), p. 28: "we think that block exemption Regulations are not legislative acts but law enforcement". See, however, Cooke, "General Report", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), p. 630, referring to the Commission's "legislative" function in proposing block exemption regulations. See also Bruzzone and Saija, "Modernizzazione dei regolamenti di esenzione: I confini rispetto alla regolazione settoriale", 8 Contr. & Impr. (Eur.) 108 (2003), p. 116, considering these regulations of declaratory and at the same time of legislative nature. See also Baron, "Die Rechtsnatur der Gruppenfreistellungsverordnungen im System der Legal Ausnahme - ein Scheinproblem", 56 WuW 358 (2006), who characterises the question of the BERs' legal nature under the legal exception system a pseudo-problem of German making that is basically irrelevant.

²³⁹ See Schaub, *supra* (2002c), p. 46; Saria, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003), p. 52.

²⁴⁰ See Bruzzone and Saija, *supra* (2003), p. 117. These aims are of course also served through the many soft law instruments issued by the Commission. Compare also Stillfried and Stockenhuber, *supra* (2001), p. 151, who stress the advantages of standardisation, simplification and legal certainty with regard to block exemption

rule them invalid in the context of private litigation.²⁴² As for the power to withdraw the benefit of the block exemption, this is reserved to the public authorities, since it entails the exercise of state prerogatives in the public interest.²⁴³

Finally, the argument that because the new system was based on *ex post* control, it would mean a *de facto* shift towards the abuse system was the result of a misunderstanding, since under no circumstances would there be a presumption that restrictive agreements were legal. On the contrary, although their overall legality or illegality in light of the whole of Article 81 EC would be examined *ex post*, it would operate *ex tunc*, rather than *ex nunc*, thus reinforcing the effectiveness of the prohibition principle.²⁴⁴

In any case, it is very likely that the Court of Justice will interpret Article 81 EC teleologically, and will accept the legality of the new Regulation and the legal exception system if it is ever called on to assess this question, notwithstanding the strict wording of the provision or the legislative history of the old Regulation 17.²⁴⁵ The Court's primary concern will be whether the Treaty objectives are served in an efficient manner and whether the new system provides for effective enforcement of the Treaty competition rules.

cc. Efficiency of Competition Law Enforcement under the New System

The *efficiency* of the new system of enforcement as originally proposed in the White Paper also raised concerns. According to critics of the modernisation, the notification system provided a very useful mechanism, through which undertakings furnished important market

regulations under the legal exception system and see no problem in those regulations having a *declaratory* nature.

²⁴¹ See Jaeger, "Die möglichen Auswirkungen einer Reform des EG-Wettbewerbsrechts für die nationalen Gerichte", 50 WuW 1062 (2000), p. 1066. Naturally, national courts will now have to examine the compatibility with Art. 81 EC in its entirety (including its third paragraph) of agreements exceeding the market share thresholds of the new generation block exemption regulations.

²⁴² See para. 2 of the Commission Notice on Art. 81(3) EC.

²⁴³ See *Idot*, *supra* (2004c), p. 19. According to Art. 29 Reg. 1/2003, the Commission may withdraw the benefit of a block exemption when an agreement, decision or concerted practice covered by the exemption produces effects that are incompatible with Art. 81(3) EC. NCAs have the same power when the effects pertain to all or part of the territory of a Member State that has the characteristics of a distinct geographic market.

²⁴⁴ See e.g. Deselaers and Obst, "Weißbuch zum Europäischen Kartellrecht - Rechtssicherheit ade?", 11 EWS 41 (2000), p. 43; Schütz, "Zur Änderung des Kartellverfahrens gemäß Artikel 81 EGV", 50 WuW 686 (2000), p. 689; Marengo, *supra* (2001a), pp. 147-148. See further Gallot, "Protection efficace de la concurrence dans une communauté élargie grâce à l'association des autorités de concurrence et des juridictions nationales", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition/>, p. 5, who rightly observes that the absence of administrative authorisation in the US does not make the US system less efficient or less oriented towards the principle of prohibition.

²⁴⁵ See Whish and Sufrin, *supra* (2000), p. 143.

information to the Commission.²⁴⁶ Valuable information was also provided by the submissions from third parties when the Commission advertised its intention to grant an exemption.²⁴⁷ This would no longer be meaningful or possible when national courts applied Article 81(3) EC.²⁴⁸ In addition, it would no longer be possible for an agreement to be exempted subject to conditions and obligations imposed by an administrative authority. Under the new system of enforcement, national courts could not impose conditions or accept commitments in the area of Article 81(3) EC.²⁴⁹ A similar point was also made with regard to negotiated settlements between the Commission and the notifying parties, who may offer to the Commission to amend their agreements so as to be granted an exemption.²⁵⁰ Such a flexible mechanism would not fit in well with civil proceedings, which are governed by the party-initiative principle,²⁵¹ and would run counter to the neutrality of the judges, whose task would be limited to declaring whether or not Article 81 EC applied to an agreement.²⁵²

The first of these two arguments by opponents of modernisation, while of some credit in the earlier days of competition law enforcement in Europe is now not so persuasive. In the last four decades the Commission has acquired a substantial degree of market information, and continues to do so, via investigations into sectors of the economy and into types of agreements,²⁵³ as well as via the merger control system, rather than through the notification of usually unproblematic agreements.²⁵⁴ It is telling that up to the publication of the White Paper, in 35 years of antitrust enforcement, the Commission was informed of agreements

²⁴⁶ See e.g. Deringer, *supra* (2000), p. 8; Wißmann, *supra* (2000), p. 149; Böge, "The Discussion on the Modernisation of EC Antitrust Policy: An Update on the Bundeskartellamt's Point of View", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 68; Hossensfelder, "The Development of the Bundeskartellamt's Position on the Modernisation Proposals of the Commission", in: *European Competition Law: A New Role for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers* (Bruxelles, 2001), p. 36.

²⁴⁷ Art. 19 Reg. 17.

²⁴⁸ See Power, "Representing Clients after the Modernisation of EC Competition Law", 14 ICCLR 335 (2003), p. 341.

²⁴⁹ See Vogelaar, *supra* (2002), p. 24; Lever, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 30; Mengozzi, "La giurisprudenza del Tribunale delle Comunità europee in materia di concorrenza e l'applicazione da parte dei giudici nazionali del regolamento del Consiglio n. 1/2003", 8 Contr. & Impr. (Eur.) 210 (2003), p. 224.

²⁵⁰ See e.g. Wolf, "Comment on the White Paper on the Reform of EC Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 309.

²⁵¹ See Möschel, *supra* (2000a), p. 65.

²⁵² See Vogelaar, *supra* (2002), p. 25.

²⁵³ Art. 17 Reg. 1/2003. The Commission had rarely used this instrument, although it recently decided to conduct such sector enquiries *inter alia* in the gas and electricity, business insurance, retail banking, financial services and New Media (3G) sectors.

²⁵⁴ See Ehlermann, *supra* (2000a), pp. 561-562; Schaub, *supra* (2001a), p. 249.

justifying the taking of a prohibition decision only in 9 cases.²⁵⁵ As for the criticism of the courts' inability to take into account the remarks of third parties and to impose conditions or accept commitments, when applying Article 81(3) EC, it is the outcome of confusion. Pronouncements by national courts on Article 81(3) EC will certainly not have the character of an "exemption", a term hardly compatible with the new system. Instead, their judgments will apply Article 81 EC as a whole, will be of a declaratory and not a constitutive nature, and will only be binding *inter partes*.²⁵⁶ At the same time, the new system does not eliminate the possibility for the Commission or other public authorities to reach informal settlements or accept commitments,²⁵⁷ which attain the same objectives and are as effective as the imposition of conditions and obligations under the previous system.

In sum, again, most commentators believed that the administrative authorisation system enforced by the Commission for the last 40 years had its day,²⁵⁸ and that the main lines of the new system met the needs of modern efficient competition law enforcement.²⁵⁹ According to

²⁵⁵ See Rocca, "Livres blanc sur la modernisation des règles d'application des articles 81 et 82 du Traité", (1999-3) *EC Competition Policy Newsletter* 1, p. 2.

²⁵⁶ Thus, the criticism heard sometimes that it will no longer be possible for courts to hear third parties, while applying Art. 81(3) EC, as the Commission was doing under the authorisation system (see Vogelaar, *supra* (2002), p. 25), is misplaced, since the courts will not be granting "individual exemptions" of constitutive *erga omnes* effect.

²⁵⁷ Art. 9 Reg. 1/2003.

²⁵⁸ On the systems of enforcement employed by the Commission in Arts. 81, 82 EC and in the Merger Regulation see the study by Wils, *supra* (1999), p. 139 *et seq.*, which was published shortly before the White Paper. The author explained that the Commission employed three systems, as provided for in secondary legislation: a. *ex post* enforcement through deterrence in the absence of prescreening, applicable to Art. 82 EC; b. *ex ante* enforcement through prescreening as a substitute to *ex post* enforcement through deterrence, applicable to mergers; and c. *ex ante* enforcement through prescreening as a complement to *ex post* enforcement through deterrence, applicable to Art. 81 EC. According to that author, back in 1957 the then Art. 85 (now Art. 81 EC) was a novel provision for Europe, therefore, it was thought that only *ex post* enforcement through deterrence was unlikely to be effective, since undertakings were unaccustomed to the principle of cartel prohibition (though not to the principle of abuse of economic power, which had precedents in Germany in the pre-war period). Hence the prescreening elements that were introduced with the system of notification and administrative authorisation. However, in modern times, according to the author, *ex ante* enforcement through prescreening appears inefficient and unsuitable for Arts. 81 and 82 EC (*idem*, p. 154). See also Idot, "La modernisation des règles européennes de concurrence : réforme, procédurale ou institutionnelle", (2001-7/8) *Rev. Conc. Consomm.* 7, p. 8; Wils, *supra* (2001), pp. 318-335; Pirrung, "EU Enlargement towards Cartel Paradise? An Economic Analysis of the Reform of European Competition Law", 1 *Erasmus Law and Economics Review* 77 (2004), p. 90.

²⁵⁹ See e.g. Pappalardo, "Les principales orientations actuelles de la politique communautaire en matière de concurrence", 119 *JdT* 488 (2000), p. 488; Bellamy, "The Modernisation of EC Antitrust Policy - Some Reflections: Don't Throw the Baby out with the Bath Water", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 315; Schröter, "The Reform of EC Competition Policy", in: Chao, San *et al.* (Eds.), *International and Comparative Competition Laws and Policies* (The Hague/London/New York, 2001), pp. 161-162; Cot, "Les enjeux de la réforme: Le point de vue d'un juriste", (2001-7/8) *Rev. Conc. Consomm.* 13, p. 14; Lucas de Leyssac and Parleani, *supra* (2002), pp. 60-61; Terhechte, "Gastkommentar: Die Reform des europäischen Kartellrechts - am Ende eines langen Weges?", 15(12) *EuZW* (2004). Compare also the proposals for reform included by the late Dan Goyder in his *EC Competition Law's* 1998 edition, which echoed the dissatisfaction with the old enforcement system (D.G. Goyder, *EC Competition Law* (Oxford, 1998), p. 600 *et seq.*).

this view, notification of usually innocuous agreements was not cost-effective,²⁶⁰ and created an excessive administrative workload²⁶¹ and a reactive enforcement culture,²⁶² and in any case the more repugnant anti-competitive agreements were never notified to the Commission.²⁶³ Indeed, the decentralisation of the application of the Treaty competition rules and the abolition of the notification system will certainly enable the Commission to focus on detecting and punishing the most serious infringements.²⁶⁴

dd. Consistency and Coherence of the New Enforcement System

A third type of argument against the system of legal exception relates to the *consistency* and *coherence* of the new enforcement system, in view of the multiple enforcers and fora to which Article 81(3) EC is now opened up. According to opponents of the reform, the abolition of the Commission's exemption monopoly means that it would no longer be possible to exercise centralised control over the application of that sensitive provision, thus "inviting" national courts and NCAs from 25 Member States, from "Palermo" to "Helsinki", to apply that rule inconsistently and incoherently, possibly taking into account erratic theories or simply serving their parochial national interests.²⁶⁵ That would lead to a re-nationalisation of EC competition law, or at least to forum shopping.²⁶⁶

Inconsistency fears were largely exaggerated by European commentators, while US commentators were on the whole more positive towards decentralisation and the

²⁶⁰ According to the UK Department of Trade and Industry the cost for UK companies of notifying an agreement to the Commission was between £30,000 and £100,000 in 2002 (Department of Trade and Industry, *Modernisation - A Consultation on the Government's Proposals for Giving Effect to Regulation 1/2003 and for Re-alignment of the Competition Act 1998*, April 2003, p. 86).

²⁶¹ See e.g. Siragusa, *supra* (1998a), p. 280.

²⁶² See Kjolbye, "The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81", 25 ECLR 566 (2004), p. 573, stressing that the Commission under the old system used to spend a considerable amount of time checking individual clauses in notified agreements.

²⁶³ See further Forrester, "Modernisation of EC Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 185, who, interestingly, thinks that essentially the parties to agreements used the notification system merely as a tactical advantage in the event that the other contracting party chose to evade its contractual obligations by relying on EC competition law and arguing that the contract was void under Art. 81(2) EC. See also Schaub, "Modernisation of EC Competition Law: Reform of Competition No. 17", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 144.

²⁶⁴ See Lowe, "Facing New Challenges for EU Competition Policy", in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003), p. 3.

²⁶⁵ This concern was increasingly expressed by in-house regulatory lawyers in big enterprises that preferred a Brussels-based easily-monitored to a decentralised hard-to-monitor system of enforcement. See e.g. Becher, "Reform des Wettbewerbsrechts aus der Sicht der Industrie", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001), p. 39.

²⁶⁶ On the forum shopping fears see Calvo Caravaca and Canedo Arrillaga, *supra* (2003), p. 37.

multiplication of enforcers.²⁶⁷ Inconsistency of enforcement between the Commission, NCAs and national courts could also be seen not only negatively but to a certain extent as a sign of "healthy experimentation".²⁶⁸ Another argument was that multiple enforcers had been a reality for quite a long time with regard to Articles 81(1) and 82 EC, and experience showed that on the whole the decentralised application of these provisions had worked well. National courts had proved to be up to the task, while the preliminary reference procedure before the Court of Justice and recent co-operation mechanisms with the Commission provided important safety checks.

Indeed, the White Paper had advocated powerful preventive and corrective measures that would ensure consistent and coherent EC competition enforcement by NCAs and courts.²⁶⁹ Then, it was never proposed that the Commission's leading role in the definition of EC competition policy would be in any respect affected.²⁷⁰ Indeed, with the benefit of hindsight, we can observe that the Commission's role is strengthened after modernisation. The Commission is now the intellectual leader and supreme enforcer of the competition rules in Europe and it is not an overstatement to say that it leads in the formation of "competition culture". Of particular importance in this context is the mass of soft law instruments that the Commission has adopted and which have considerably shaped the system of competition law enforcement in Europe. It is clear that in this regard the national authorities merely respond to and follow the Commission's initiatives.

ee. Legal Certainty in the New Enforcement System

Another fear of opponents of the modernisation was that *legal certainty* would decrease in a system of legal exception, since undertakings would no longer be able to notify their

²⁶⁷ See e.g., already before the White Paper, Fox, "Panel One Discussion: Decision Making at the Centre", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997), p. 8, stressing that the more enforcement is dispersed, the more likely it is that the best law would evolve from a larger set of enforcers and decision makers. On decentralisation and interjurisdictional competition see Kerber, "Interjurisdictional Competition within the European Union", 23 *Fordham Int'LLJ* S217 (2000).

²⁶⁸ See Vance, "Judicial Application of Article 81(3): Are the Fears Justified?", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 621. See also in that sense Böge, "Die Erste Seite: Europäisches Kartellrecht: Modernisierung ja, aber nicht um jeden Preis", 12(4) *EWS* (2001); Venit, "Private Practice in the Wake of the Commission's Modernization Program", 32 *LIEI* 147 (2005), p. 153.

²⁶⁹ On these measures see below.

²⁷⁰ See Schaub, "Wandel des Europäischen Wettbewerbsrechts", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001), p. 21.

agreements and seek an exemption or - at least - a comfort letter.²⁷¹ Under the new system of enforcement they would have to evaluate the possibly anti-competitive nature of their agreement themselves and thus be in an insecure position, particularly when involved in significant transactions entailing a high volume of investment and commercial risks. Legal uncertainty would increase further as a result of the more economic approach favoured by the new block exemption regulations and other Commission soft law instruments, such as the *de minimis* Notice²⁷² and the Guidelines on vertical restrictions and on horizontal co-operation agreements.²⁷³ The use of market power as a criterion for applying the prohibition of Article 81 EC made it more difficult for undertakings to assess the legality or otherwise of their agreements.²⁷⁴ These arguments were made especially with reference to the ability of national courts to deal with the new economic approach. Some authors stressed a certain contradiction between the more economic approach and the opening up of competition law enforcement to national courts.²⁷⁵

On the legal certainty side of the debate, it is noteworthy that US commentators again expressed the view that this concern is a "European obsession", since uncertainty is inherent in competition law, so long as *per se* rules of permission and prohibition are only an exception.²⁷⁶ A certain degree of uncertainty is therefore inevitable.²⁷⁷ However, the substantial and ever-increasing case law of the Commission and the European Courts and the

²⁷¹ See e.g. Paulweber, *supra* (2000), pp. 37-38; Bartosch, "Von der Freistellung zur Legalausnahme: Der Vorschlag der EG-Kommission für eine 'neue Verordnung Nr. 17'", 12 EuZW 101 (2001), p. 105. It is somewhat ironic that in this line of rejectionist arguments against the legal exception system, comfort letters finally found favour, when they had always been considered a failure of the previous system.

²⁷² Commission Notice on Agreements of Minor Importance Which Do not Appreciably Restrict Competition under Article 81(1) of the Treaty Establishing the European Community (*de minimis*), OJ [2001] C 368/13.

²⁷³ Commission Notice - Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ [2001] C 3/2.

²⁷⁴ See Frignani, Gentile and Rossi, "La devolution dell'antitrust: Prime riflessioni intorno al 'libro bianco' sulla modernizzazione", 2 Merc.Conc.Reg. 171 (2000), p. 188; Bishop, "Modernisation of the Rules Implementing Articles 81 and 82", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 57-60; Schröter, *supra* (2003), p. 200; Idot and Van de Walle de Ghelke, *supra* (2001), p. 169, speaking of "insécurité généralisée".

²⁷⁵ See Mestmäcker, *supra* (2000b), pp. 422, 425; Bishop, *supra* (2001), p. 62; Mestmäcker, *supra* (2001), p. 235; Vogelaar, *supra* (2002), pp. 21-22.

²⁷⁶ See Hawk and Denaeijer, "The Development of Articles 81 and 82 EC Treaty: Legal Certainty", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 130, 137, 140.

²⁷⁷ See Fox, "Panel One Discussion: Compatibility, Efficiency, Legal Security", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 24; Forrester, *supra* (2001), p. 102; Idot, "Les entreprises face à la suppression de l'autorisation préalable", Paper Presented at the ICC (20 November 2003), p. 7. According to Venit, *supra* (2003), pp. 554-555, under the new regime, rigorous self-assessment possibly coupled with some informal consultation with the Commission should provide an adequate and less costly alternative than notification. The Commission has published a Notice on informal guidance with regard to novel questions concerning Arts. 81 and 82 EC. This informal mechanism, however, is intended only for exceptional circumstances. On this Notice, see *infra*.

publication of block exemption regulations, as well as more notices, communications and other soft law instruments, should provide a satisfactory degree of legal certainty.²⁷⁸

Besides, the old system was not really perfect from a certainty point of view. It too contained elements of self-assessment and consequently of uncertainty, notwithstanding the notification mechanism. Thus, following the *Haecht II* ruling²⁷⁹ the notification of restrictive agreements did not amount to their provisional civil validity, and only very rarely did the Commission actually proceed to exemption decisions. If anything, in most cases it would perhaps issue a comfort letter, which did not carry the same degree of legal certainty.

It therefore seems that, at least in that respect, the new system of enforcement will give firms more legal certainty, because owing to the abolition of the Commission's exemption monopoly and the need for notification, it will no longer be possible to use the nullity sanction of Article 81(2) EC as a tactical weapon for competition law litigation.²⁸⁰ Firms will no longer be held hostage to the split between the first and the third paragraphs of Article 81 EC, with the Damocles sword of the second paragraph over their heads,²⁸¹ leaving them no other option but to notify and thus submit "to a flawed system", as some have put it.²⁸² Under the new system all agreements will be perfectly enforceable unless held to be otherwise by a court, which will be able to give judgment by reference to all the elements of Article 81 EC. This will reduce spurious litigation on competition grounds, while the more important and serious cases which are bound to come before the courts will foster the awareness of the judiciary, the bar and firms themselves of the true competition problems.²⁸³

d. The New Regulation 1/2003

²⁷⁸ See Von Bogdandy, "Legal Equality, Legal Certainty and Subsidiarity in Transnational Economic Law - Decentralized Application of Art. 81.3 EC and WTO Law: Why and why not", in: Von Bogdandy, Mavroidis & Mény (Eds.), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague/London/New York, 2002), pp. 20-21.

²⁷⁹ See above.

²⁸⁰ See in this respect Bishop, *supra* (2001), p. 57; Alexiadis and Sullivan, *supra* (2003), p. 70.

²⁸¹ See Venit, *supra* (2005), pp. 148, 151, speaking of the "procedural absurdity" of this *ex lege* illegality.

²⁸² See Brown, "Notification of Agreements to the EC Commission: Whether to Submit to a Flawed System", 17 ELRev. 323 (1992), in particular p. 336 *et seq.*

²⁸³ See in this context former Commissioner Monti, "Les réformes en cours en matière de concurrence: Mise en perspective", Speech Made at the Cercle fédéraliste européen, (Brussels, 22 November 2002), in: <http://europa.eu.int/comm/competition/speeches>, speaking of a "responsabilisation, par une plus grande liberté accordée à l'ensemble des protagonistes de la politique de concurrence". One cannot, however, fail to note here a certain disharmony between this argumentation of the Commission and its overall enthusiasm for the enhancement of private antitrust enforcement.

After substantial post-White Paper discussions (characterised as a “model of democracy”²⁸⁴) between the Commission and all interested parties (Member States, NCAs, businesses, lawyers, etc.), the Commission adopted a formal proposal on 27 September 2000 and forwarded it to the Council.²⁸⁵ The basic system set out in the proposal followed the White Paper, but it also contained provisions not spelled out there, the most important ones being Article 2, which provided that the burden of proving an infringement of Article 81(1) EC rested with the authority, while the defendant had the burden of proving the conditions of Article 81(3) EC,²⁸⁶ and Article 3 on exclusion of the application of national competition laws, which will be analysed in detail below.²⁸⁷

Many of the proposed regulation’s provisions were contested at Council level by some Member States, principally Germany, the centre of most negative reactions. However, as the general outlines of the proposed system were accepted rather warmly and as there was a wide consensus that the old system was no longer tenable, the proposal’s prospects of becoming

²⁸⁴ See Idot, “L’application des articles 81 et 82 CE: L’entrée dans le nouveau millénaire...”, (2000-12) *Europe* 3, p. 4.

²⁸⁵ *Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (“Regulation Implementing Articles 81 and 82 of the Treaty”), COM(2000) 582 final, OJ [2000] C 365E/284. On the Commission’s regulation proposal see e.g. Bechtold, “Modernisierung des EG-Wettbewerbsrechts: Der Verordnungs-Entwurf der Kommission zur Umsetzung des Weißbuchs”, 55 BB 2425 (2000); Martínez Lage, “Editorial: ¿Próximo big bang en el derecho comunitario de la competencia?”, (2000-11/12) GJ 3; Riley, “The Draft Competition Regulation”, Focus, [2000] 12 Euro.CL xi; Arhel, “Modernisation des règles relatives aux ententes et abus de position dominante”, *Petites Affiches*, 4-12-2000, No. 241, 7; Jalabert-Doury, “Concurrence européenne et internationale : Le projet de nouveau règlement d’application des articles 81 et 82 TCE”, (2001) RDA/IBLJ 55; Gröning, “Die dezentrale Anwendung des EG-Kartellrechts gemäß dem Vorschlag der Kommission zur Ersetzung der VO 17/62”, 47 WRP 83 (2001); Bartosch, *supra* (2001), p. 101 *et seq.**

²⁸⁶ Art. 2 did nothing more than codify the case law of the Community Courts. See e.g. *Consten & Grundig, op.cit.*, at 347; case T-34/92, *Fiatagri and New Holland Ford v. Commission*, [1994] ECR II-905, para. 99; *Métropole Télévision, op.cit.*, paras. 130-131. Because the White Paper had not addressed the question of the burden of proof in Art. 81(1) and (3) EC, some commentators referred to the risk that modernisation might place the burden of proving the conditions of Art. 81(3) EC on the Commission and on plaintiffs (see e.g. Mestmäcker, *supra* (2001), p. 233; Idot, *supra* (2001a), p. 343; Kist and Tierno Centella, “Coherence and Efficiency in a Decentralised Enforcement of EC Competition Rules: Some Reflections on the White Paper on Modernisation”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 375). The Commission sought to assuage these fears in its September 2000 proposal with the inclusion of Art. 2. See further Paulis and Gauer, *supra* (2003), p. 66. For a critical view of Art. 2 see Rinaldi, “Il regolamento del Consiglio N. 1/2003: Un primo esame delle principali novità e dei punti aperti della riforma sull’applicazione delle regole comunitarie in tema di concorrenza”, 17 Dir.Comm.Int. 143 (2003), p. 148. According to this commentator the reversal of the burden of proof in Art. 81(3) EC is not consistent with the philosophy of the new system and with the integrated nature of Art. 81 EC. An intriguing issue is the burden of proof in Art. 82 EC. While it would seem from the letter of Art. 2 Reg. 1/2003 that the burden of proving all the conditions of Art. 82 EC lies with the Commission, the effectiveness of competition law enforcement seems to require that the defendant should at least prove those facts that are within his own sphere of influence and tend to exculpate him. This should apply to efficiency defences or defences based on objective justification.

²⁸⁷ Another new - seemingly at least - provision was Art. 7 on the imposition of structural remedies.

law were good.²⁸⁸ Indeed, two years after the official Commission proposal, on 16 December 2002, the Council adopted the new "Regulation on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty", which became Regulation 1/2003.²⁸⁹ The new Regulation entered into force on 24 January 2003 and started to apply from 1 May 2004.²⁹⁰ It was accompanied by six Commission Notices making up the "Modernisation Package", applicable from 1 May 2004.²⁹¹ Since Regulation 1/2003 itself could not establish the details of how the new modernised and decentralised enforcement system would operate, the Notices were intended to fill this gap and offer national authorities and courts assistance in their new role as EC competition law enforcers. They are essentially a "restatement" of substantive and procedural EC competition law.²⁹² Their flexibility and soft-law nature are perfectly adapted to the new system of self-assessment and the economic-based approach. They are not binding on national authorities and courts,²⁹³ but their persuasive value is such that they are already being treated as hard law.²⁹⁴ Indeed, they are frequently used as a source of inspiration for the application of national competition law.²⁹⁵ The shift in the enforcement system that Regulation 1/2003 is stated in a celebrated manner in its Article 1(2), according to which "agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall

²⁸⁸ For short descriptions of the long period between the Commission proposal of September 2000 and the final adoption of Reg. 1/2003, see the Commission's Annual Reports on competition policy for 2000, 2001, and 2002, in particular the one for 2001: *Commission XXVth Report on Competition Policy - 2001* (Brussels/Luxembourg, 2002), pp. 15-16.

²⁸⁹ OJ [2003] L 1/1. On the main points where Reg. 1/2003 departed from the original regulation proposal of September 2000 see Pignataro, "La riforma del diritto comunitario della concorrenza: Il regolamento n. 1/2003 sull'applicazione degli articoli 81 e 82 del Trattato CE", 8 *Contr. & Impr. (Eur.)* 233 (2003), pp. 249-259.

²⁹⁰ Art. 45 Reg. 1/2003.

²⁹¹ *Commission Notice on Cooperation within the Network of Competition Authorities*, OJ [2004] C 101/43; *Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC*, OJ [2004] C 101/54; *Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ [2004] C 101/65; *Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters)*, OJ [2004] C 101/78; *Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty*, OJ [2004] C 101/81; *Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty*, OJ [2004] C 101/97.

²⁹² With the exception of the Notice on Art. 81(3), all Notices apply equally to Art. 82 EC.

²⁹³ See further Pampel, "Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht", 16 *EuZW* 11 (2005), p. 12. It is not to be excluded, however, that unjustified and unqualified departure from the Notices by a national court or authority may violate Art. 10 EC, insofar as the Notices may make explicit what is implicit in hard law provisions of EC competition law, in Community Courts' case law and in their *effet utile*.

²⁹⁴ This raises of course a question of legitimacy as to the Commission's action. See further Forrester, "Modernisation: An Extension of the Powers of the Commission?", in: Geradin (Ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerp/Oxford, 2004), pp. 87-89; Senden, "Soft Law and its Implications for Institutional Balance in the EC", 1(2) *Utrecht Law Review* 79 (2005), p. 87 *et seq.*

²⁹⁵ See Parret, "Judicial Protection after Modernisation of Competition Law", 32 *LIEI* 339 (2005), p. 347.

not be prohibited, no prior decision to that effect being required". To make this more evident, Articles 5 and 6 of the new Regulation state that the competition authorities of the Member States and national courts will have the power to apply Articles 81 and 82 EC in individual cases. In sum, NCAs and national courts now have full competence to apply Articles 81 and 82 EC in their entirety, the only exception being the withdrawal of the benefit of a block exemption with *erga omnes* effect under Article 29 of Regulation 1/2003, where the Commission enjoys exclusive competence.²⁹⁶

Under the new system, the Commission has the power to adopt four kinds of decisions. It may:

- (a) order the termination of infringements (with or without the imposition of fines-negative decisions),²⁹⁷
- (b) order interim measures (a power which was formerly judicially created),²⁹⁸
- (c) accept commitments and make them binding on third parties,²⁹⁹ and
- (d) declare that the competition rules do not apply to particular conduct (positive decisions).³⁰⁰

²⁹⁶ On the role of national courts in such a case, see below.

²⁹⁷ Art. 7 Reg. 1/2003.

²⁹⁸ Art. 8 Reg. 1/2003.

²⁹⁹ Art. 9 Reg. 1/2003. The Commission may exercise this power when it intends to adopt a prohibition decision but refrains from doing so as a result of the commitments offered, if the commitments meet its concerns as expressed in its "preliminary assessment", equivalent to a statement of objections. Interestingly enough, this new power of the Commission and NCAs applies to both Article 81 EC and Article 82 EC cases. For examples of this new procedure see case COMP/37.214-*Joint selling of the media rights to the German Bundesliga* (proposed commitments published in OJ [2004] C 229/13); case COMP/38.173-*The Football Association Premier League Limited (FAPL)* (proposed commitments contained in an Art. 19(3) Reg. 17 Notice, published at OJ [2004] C 115/3, and subsequently amended); case COMP/39.116-*Coca-Cola* (proposed commitments published in the Commission's website on 19 October 2004); case COMP/38.381-*De Beers/ALROSA* (proposed commitments published in OJ [2005] C 136/32); case COMP/38.348-*Repsol CPP SA* (proposed commitments published in OJ [2004] C 258/7); cases COMP/39.152-*BUMA* and COMP/39.151-*SABAM (Santiago Agreement)*-COMP/38.126 (proposed commitments published in OJ [2005] C 200/11); case COMP/ 37.749-*Austrian Airlines/SAS cooperation agreement* (proposed commitments published in OJ [2005] C 233/18); case COMP/38.681-*Universal International Music BV/MCPS and others (The Cannes Extension Agreement)* (proposed commitments published in the Commission's website on 23 May 2006 and reported in OJ [2006] C 122/2). In the first five cases the Commission adopted formal Decisions rendering legally binding the commitments concerned: Commission Decision 2005/396/EC of 19 January 2005 (*Joint selling of the media rights to the German Bundesliga*), OJ [2005] L 134/46; Commission Decision of 22 March 2006 (*Joint selling of the media rights to the FA Premier League*); Commission Decision of 22 June 2005 (*Coca-Cola*); Commission Decision 2006/520/EC of 22 February 2006 (*De Beers/ALROSA*), OJ [2006] L 205/24; Commission Decision of 12 April 2006 (*Repsol CPP SA*). In the other cases the Commission intended to proceed to a formal Decision after inviting interested third parties to submit their comments. On the bearing of these decisions on national proceedings, see below. There are commentators that have doubted whether such commitments decisions are compatible with the Treaty. According to this line of criticism, Art. 83(2)(b) EC, on which Reg. 1/2003 is based, speaks of "detailed rules for the application of Article 81(3)", yet a commitments decision does not amount to "application" of law, at least with regard to Art. 81(3) EC. See e.g. Jaeger, *supra* (2000), p. 1069. This view, however, appears overly formalistic. Besides, Art. 83(1) EC, which "speaks of appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82", is wide enough to cover such commitments decisions.

The new Regulation provides also for extensive duties of co-operation between the Commission and NCAs and courts. These are further specified in notices and guidelines in the "Modernisation Package".³⁰¹

Regulation 1/2003 was hailed by most actors in EC competition enforcement as a breakthrough, since it ended the Commission's monopoly on granting exemptions under Article 81(3) EC and it placed "national competition authorities and courts in the driving seat for much of competition law enforcement",³⁰² thus also lending more legitimacy to EC competition law.³⁰³ As already noted, the fundamental basis of the new system is that it abolishes the notification and authorisation system and decentralises antitrust enforcement to NCAs and courts. It thus leads to a certain "privatisation" of competition policy enforcement, since the burdens and risks of the Treaty competition rules will fall entirely on companies and their legal advisers,³⁰⁴ who must now engage in rigorous self-assessment.³⁰⁵ That is bound to lead to "a new, 'rights-based' common culture of competition in the Community".³⁰⁶

3. The Pillars of the New Decentralised System of EC Competition Law Enforcement: "Centralised Decentralisation"?

The new decentralised system of enforcement had a profound effect on Member States' laws and institutions. It has firstly succeeded in creating a level-playing field for competition law enforcement in Europe, favouring as much as possible the "one-stop shop" principle, and has

³⁰⁰ Art. 10 Reg. 1/2003. Only the Commission is competent to take this last type of decision, and only when the Community public interest so requires. NCAs will not have the competence to take such decisions. The national courts are, of course, not precluded from applying Articles 81 and 82 in full in their jurisdiction, either negatively or positively.

³⁰¹ See below.

³⁰² Thus, according to Melanie Johnson, Parliamentary undersecretary of State for competition, consumers and markets, in: Department of Trade and Industry, *op.cit.*

³⁰³ On the legitimacy brought about by the decentralised application of EC competition law by national authorities and courts, see Maher, "Re-imagining the Story of European Competition Law", 20 OJLS 155 (2000), p. 159.

³⁰⁴ On the "privatisation" of EC competition law enforcement already in the context of block exemption regulations, where the Commission has in a sense "delegated" its review power to companies' in-house compliance departments, see Marsden, "Inducing Member State Enforcement of European Competition Law: A Competition Policy Approach to 'Antitrust Federalism'", 18 ECLR 234 (1997), p. 235.

³⁰⁵ See Mersing, "The Modernization of EC Competition Law - The Need for a Common Competition Culture", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 262; Venit, *supra* (2003), p. 546; Bechtold, "Maßstäbe der 'Selbstveranlagung' nach Art. 81 Abs. 3 EG", Kommentar, 53(4) WuW (2003). See also Rey, "Les enjeux de la réforme: Le point de vue d'un économiste", (2001-7/8) Rev.Conc.Consomm. 11, p. 12, speaking of "responsabilisation des entreprises".

³⁰⁶ See Middleton, "Modernization of European Community Competition Law Enforcement for the Twenty-first Century", in: *Humanizing our Global Order, Essays in Honour of Ivan Head* (Toronto, 2003), p. 125.

secondly created a legislative and enforcement model that is widely copied and followed nationally. We can thus speak of the formation of a common EU-wide system of competition law enforcement, which may not be of a strictly federal nature, yet has many federal elements.

It is interesting to note that communitarisation and decentralisation, two aims that may at first glance seem antithetical, go hand-in-hand. Thus, the expansion in the application of EC competition law in Europe, or in other words the "communitarisation" of competition law enforcement, has been characterised in recent years by a parallel and proportionate process of decentralisation. Conversely, decentralisation itself leads to more checks and balances which ensure consistency in the system. This is the rather paradoxical link between decentralisation itself, and greater harmonisation, unification and, ultimately, communitarisation.³⁰⁷ The most striking features of the modernisation and decentralisation of competition law enforcement in Europe are the extended application of Community over national competition law and the strengthening of the "Community" identity of national enforcement organs when they apply EC competition law. These are in a sense the fundamental pillars upon which the new system is based.

a. Strengthening the Supremacy of Community over National Competition Law

One specific issue which deserves attention is the applicability of EC competition law to the facts of a case and, more particularly, the relationship between that law and the national competition laws of the EU Member States. The new Regulation has placed this whole

³⁰⁷ Thus, decentralisation and subsidiarity have in this sense another facet, one of integration, harmonisation, unification and communitarisation. This is "l'effet caché et paradoxal" of subsidiarity, in the words of Lucas de Leyssac and Parleani, *supra* (2002), p. 794. See also Whish and Sufrin, *supra* (2000), p. 152; Gautron, "Subsidiarité ou néo-subsidiarité", 8 RAE/LEA 3 (1998), p. 6; Tesouro, *supra* (2000b), p. 156; *idem*, *supra* (2001), p. 260. Compare also the Opinion of AG Poiares Maduro in cases C-94/04, *Federico Cipolla v. Rosaria Fazari (née Portolese)* and C-202/04, *Stefano Macrino and Claudia Capodarte v. Roberto Meloni*, judgment pending, para. 28: "The force awarded by the Court to judgments it has delivered in the past may be considered to derive from the need to secure the values of cohesion, uniformity and legal certainty inherent in any system of law. Those values are all the more important within the context of a decentralised system of applying the law such as that of the Community legal system." For a more general perspective compare the parallelism between integration and decentralisation drawn by Tizzano, *supra* (1995), p. 114; *idem*, *supra* (2001), p. 210. According to the latter author, the further integration advances, the greater should the involvement of national authorities and courts be, so as to ensure democracy, participation and to guarantee the efficiency of the whole system. At the same time, the more such authorities and courts take part in realising the Community's objectives and tasks, the more bound they are in their actions to respect the rules and goals of the system, in accordance with the fundamental principles of integration (supremacy, direct effect, effectiveness and non-discrimination).

question on a different basis and the supremacy of EC over national competition law has now been strengthened.

aa. The Confirmation of the Broad Nature of the Effect on Trade among Member States

Community competition law is applicable if the anti-competitive practice in question has an actual or potential effect on trade between Member States, which is the jurisdictional boundary between Community and national competition law.³⁰⁸ The Court of Justice has in the past given a broad interpretation to this criterion, so as to bring as many practices as possible into the ambit of Community law.³⁰⁹ This broad interpretation furthers the Treaty's basic aim of ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC).³¹⁰ Although the Court has occasionally followed a narrower meaning,³¹¹ the broad interpretation remains the norm.³¹²

In the decentralised enforcement system a narrow interpretation of the effect on inter-state trade would run counter to one of the most prominent aims of the reform, which is to involve as many enforcers as possible in EC competition law enforcement.³¹³ It would also lead to re-

³⁰⁸ See Kirchner, "Verhältnis zwischen deutschem Kartellrecht und europäischem Wettbewerbsrecht - Zuständigkeiten, Konflikte, Reformkonzepte", in: *Schwerpunkte des Kartellrechts 2001, Referate des XXIX. FIW-Seminars* (Köln/Berlin/Bonn/München, 2002), p. 3, who rightly stresses that the inter-state trade effect criterion is not based on a clear legal notion, but rather on an economic-legal one.

³⁰⁹ Case 56/65, *Société Technique Minière (LTM) v. Maschinenbau Ulm GmbH (MBU)*, [1966] ECR 235; case 126/80, *Maria Salonia v. Giorgio Poidomani et al.*, [1981] ECR 1563; case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, [1991] ECR I-1979.

³¹⁰ See e.g. Ellger, "Das Verhältnis der Wettbewerbsregeln des EG-V zu den Gesetzen gegen Wettbewerbsbeschränkungen in den Mitgliedstaaten der Europäischen Gemeinschaft: Vom Vorrangprinzip zur Exklusivitätsregeln", in: Basedow, Drobnig et al. (Eds.), *Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht* (Tübingen, 2001), p. 269.

³¹¹ Cases C-215/96 and C-216/96, *Carlo Bagnasco et al. v. Banca Popolare di Novara Scarl and Cassa di Risparmio di Genova e Imperia SpA*, [1999] ECR I-135.

³¹² The Court of Justice has recently restated its traditional view that agreements relating to the marketing of products in only one Member State are still capable of affecting inter-state trade. See case C-359/01, *British Sugar plc v. Commission*, [2004] ECR I-4933, paras. 27-28.

³¹³ This appears to have escaped the Commission's attention in its *Dutch Banking Association* Decision that was rendered after the publication of the White Paper and which followed *Bagnasco* (Commission Decision 1999/687/EC of 8 September 1999 (*Nederlandse Vereniging van Banken* (1991 GSA agreement), *Nederlandse Postorderbond*, *Verenigde Nederlandse Uitgeversbedrijven* and *Nederlandse Organisatie van Tijdschriften Uitgevers/Nederlandse Christelijke Radio Vereniging*), OJ [1999] L 271/28). In that respect the view of a Commission official that the scope of application of Arts. 81 and 82 EC should not be narrowed and that a wide interpretation of the effect on inter-state trade should continue to be adopted, is in the right direction (see Paulis, "Panel Two Discussion: Coherence", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 284; *idem*, *supra* (2001a), p. 404). If we also take into account the doubts expressed by Former Advocate General Tesauro as to *Bagnasco* (Tesauro, "Panel Two Discussion: Coherence", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 300), then we wonder

nationalisation of competition law enforcement in Europe.³¹⁴ As already stressed, the communitarisation of competition law enforcement is inherently connected with a parallel and proportionate process of decentralisation and conversely decentralisation requires a certain communitarisation of laws and institutions.³¹⁵ That is why proposals to substitute, by means of legislation or judicial interpretation, a "Community interest" criterion for the inter-state trade effect criterion, should be rejected.³¹⁶ Community interest can only be an administrative or procedural marker defining whether the anti-competitive practice will be dealt with by the Commission or national authorities. In such a case the enforcer may vary, but the law applicable to the practice in question remains *Community* competition law.

Indeed, in its recent Notice on the effect on trade between Member States,³¹⁷ the Commission seems to follow the traditional liberal interpretation. The Notice lists the three elements to be addressed when considering whether trade between Member States may be affected. Firstly, the concept of "trade between Member States" implies that there must be an impact on the flow of goods and services or other forms of economic activity, involving at least two Member States. Secondly, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability that the agreement or practice may have an influence (direct or indirect, actual or potential) on the pattern of trade between Member States. Thirdly, the notion of "effect" incorporates a quantitative criterion, so effects must be of a certain magnitude for EC law to apply.

whether this ruling will continue to be good law in the new system of enforcement. On *Bagnasco* and the modernisation see also Venit, *supra* (2001), pp. 465-471.

³¹⁴ See M. Drahos, *Convergence of Competition Laws and Policies in the European Community, Germany, Austria, and the Netherlands* (The Hague/London/Boston, 2001), p. 433.

³¹⁵ See above.

³¹⁶ See Wesseling, "The Commission Notices on Decentralisation of EC Antitrust Law: In for a Penny, Not for a Pound", 18 ECLR 94 (1997), p. 96; Rodger and Wylie, "Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement", 18 ECLR 485 (1997), p. 490; Wißmann, *supra* (2000), p. 126. These proposals lead to confusion between a substantive criterion (inter-state trade effect) that determines the applicability of *Community* or *national* law, and a procedural-administrative one that determines the enforcing authority of *Community* competition law. In any event, while these views may have been reasonable under the old centralised enforcement system, they are inconsistent with the decentralised model of Reg. 1/2003, which clearly presupposes the use of the above two criteria for different purposes. In particular, the Community interest criterion will be widely used in the demarcation of competences and allocation of cases between the Commission and NCAs. This becomes more apparent in the Commission Notice on co-operation within the European Competition Network (ECN). Compare also the pertinent use of the "Community public interest" in Art. 10 Reg. 1/2003, according to which the Commission will have exclusive competence, to the exclusion of NCAs, to adopt "inapplicability" decisions. On the distinction between "inter-state trade effect" and "Community interest" see also Schaub, "EC Competition System: Proposals for Reform", in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), pp. 130-131.

³¹⁷ OJ [2004] C 101/81. For a first view of the Notice see Idot, *supra* (2004c), p. 44 *et seq.*; Viennois, "Clarification du champ d'application du droit communautaire de la concurrence: Brèves observations sur la communication de la Commission européenne relative à la notion d'affectation du commerce figurant aux articles 81 et 82 du Traité", *Petites Affiches*, 22-9-2004, No. 190, 9.

The Notice attempts to tackle the question of the appreciability of effect by employing two presumptions, one negative and one positive, which rely on quite low thresholds, thus extending the scope of Community competition law.³¹⁸ According to the negative presumption, for an agreement to be presumed not to affect inter-state trade appreciably, the aggregate market share of the parties on any relevant market within the Community must not exceed 5 %, and the aggregate annual Community turnover in the products covered by the agreement must not exceed EUR 40 million.³¹⁹ The turnover criterion refers to both undertakings concerned in case of horizontal agreements, and to the supplier in the case of vertical agreements. According to the positive presumption, an agreement or practice which by its very nature is capable of affecting trade between Member States, for example because it concerns imports or exports or covers several Member States, will be presumed to affect inter-state trade appreciably if the annual Community turnover exceeds EUR 40 million or the market share of the parties exceeds 5 %.³²⁰

bb. The Relationship between National and Community Competition law – The Pre-existing Unsatisfactory State of the Law

Owing to the broad interpretation of the inter-state trade effect criterion, many practices connected with a particular Member State which thus fall under national competition law are also caught by the Treaty competition rules. The two legal regimes therefore apply cumulatively to such practices.³²¹ The relationship therefore between Community and

³¹⁸ See paras. 52-53 of the Notice. Some commentators go as far as arguing that the *de minimis* rule is no longer in accord with the *effet utile* of the Treaty competition rules under the new decentralised system of enforcement. See e.g. Viennois, *supra* (2004), p. 12.

³¹⁹ This rule is often referred to as the "NAAT – non-appreciable-affectation-of-trade" rule. According to the Commission, the product-specific turnover criterion is a better indicator of trade effects than global turnover. See in this respect Director General Lowe, "Recent Reforms and Future Projects for the Enforcement of the EU Anti-trust System", Speech Made at the Annual Conference of the Spanish Antitrust Court", July 8th 2003, in: <http://europa.eu.int/comm/competition/speeches>, pp. 3-4; Fellenius-Omnell, Landström and Coyet, "Modernizing EC Competition Law: Will a System of Parallel Application of EC and National Competition Laws Ensure Convergence?", in: Hawk (Ed.), *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy 2002* (New York, 2003), p. 109.

³²⁰ See para. 53 of the Notice. The 5 % positive presumption does not apply if the agreement covers only part of a Member State.

³²¹ The cumulative application of both national and EC competition law to these practices is the rule, unless the national legislation provides otherwise. This is the case in Italian law, which is expressly applicable only to conduct that does not fall under the EC competition rules (Art. 1(1) of L. 287 of 10 October 1990). However, the Italian authority and courts have interpreted this provision strictly and exclude the application of Italian law not in all cases of *applicability* of EC law, but only where the latter has been or is *actually applied*. See further Benedettelli, "Ulteriori riflessioni sull'ambito di applicazione della legge n. 287/1990 (risposta a Marino Bin)", 8 Contr. & Impr. 587 (1992), pp. 596-597; Munari, *supra* (1992), p. 623; Frignani, "Competition Law in Italy", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. I,

national competition law is a critical issue. While Article 83(2)(e) EC mentions the determination of the relationship between national competition laws and EC competition law as a possible object of secondary Community legislation, until recently this provision had never been used to that effect.³²² Regulation 1/2003 breaks with this pattern and is explicitly also based on that Treaty provision.

Historically, there have been two views on the relationship between national and EC competition law. The "single barrier" theory held that the applicability of Community competition law excluded national competition laws altogether,³²³ and the rather more popular "double barrier" theory held that the two sets of rules had different objectives, and were therefore both applicable. Consequently, an agreement or practice had to pass both tests in order to be lawful.³²⁴ Thus the more stringent legal regime would always prevail over the more lenient.

In *Walt Wilhelm*³²⁵ the Court of Justice accepted in principle that national and Community competition laws differ in their points of view, since Community law regards anti-competitive behaviour in light of the resulting obstacles to inter-state trade, and therefore both might be applicable. However, the Court stressed that this parallel application must not prejudice the uniform application of EC competition law and the effectiveness (*effet utile*) of the relevant Community implementing measures. In other words, the Court rejected an unqualified application of the "double barrier" theory as contrary to Community law.³²⁶ Working in the context of Article 81 EC and with reference to prohibition and exemption decisions taken by the Commission, the Court then made a sibylline reference to "certain

EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland (The Hague/Deventer, 2000), p. 375; Oglio, "Italy", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003), p. 248. Danish law also contained a parallel provision (s. 4 of the Competition Act, which is now repealed), according to which national law would not apply to anti-competitive agreements and concerted practices falling under Community law that had been granted an individual exemption by the Commission or that satisfied the requirements of a block exemption regulation. The Danish rule was of more limited scope than the Italian one, since it referred only to Art. 81 EC conduct. At the same time, however, it went further than the *Walt Wilhelm* principle (see *infra*), in excluding the cumulative applicability of national competition law altogether in such cases, even if the latter did not prejudice the uniform and effective application of Art. 81 EC. The UK Competition Act, as it currently stands, in s. 10 follows a similar approach, providing that any agreements exempted from the Community prohibition under Art. 81(3) will also be exempt from the equivalent domestic prohibition of Chapter I. The same is true, if the agreement falls under a Community block exemption regulation. See further Taylor, *supra* (1999), p. 101 *et seq.*

³²² In dealing with this issue, Reg. 1/2003 is also based on Art. 83(2)(e). See Recital 8.

³²³ See Catalano, "Rapports entre les règles de concurrence établies par le Traité CEE et les législations des États membres", 15 RIDC 269 (1963), p. 283 *et seq.*

³²⁴ See Koch, "Das Verhältnis der Kartellvorschriften des EWG-Vertrags zum Gesetz gegen Wettbewerbsbeschränkungen", 14 BB 241 (1959), p. 244 *et seq.*

³²⁵ Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] ECR I.

³²⁶ It is true, however, that the Court did not elaborate on the different possibilities of conflict between Community and national parallel proceedings.

positive, though indirect" Community measures, which aim at promoting a harmonious development of economic activities in the Community.³²⁷ Presumably such measures would exclude an inconsistent application of national law.

Following these principles, if Community competition law prohibited a certain anti-competitive practice, the principle of supremacy applied in full and national competition law could not permit that practice.³²⁸ In addition, Community competition law could prohibit a practice that had been permitted under national competition law by national authorities or courts.³²⁹ If both laws prohibited the same behaviour, there was no conflict.³³⁰ If EC competition law did not apply because there was no actual or potential effect on trade between Member States, then only national competition law was applicable.³³¹ A problem arose when the behaviour in question was not prohibited under EC competition law, but national competition law was stricter. The possibility of conflicts was more evident in cases governed by Article 81 EC, which is a more technically and procedurally complex provision than Article 82 EC.

There have been differing views as to what constituted a "positive" Community measure. Almost all commentators considered that individual exemption decisions had this quality in view of their constitutive nature.³³² It has been debated whether block exemptions were also

³²⁷ *Walt Wilhelm, op.cit.*, para. 5.

³²⁸ See e.g. Rounis, *supra* (1992), p. 42; Putman, *supra* (1998), p. 381.

³²⁹ Cases 43/82 and 63/82, *Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) and Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v. Commission*, [1984] ECR 19, para. 40; case 45/85, *Verband der Sachversicherer e.V. v. Commission*, [1987] ECR 405, paras. 20-24; case T-66/89, *Publishers Association v. Commission*, [1992] ECR-II-1995, paras. 19-21, 78-79. The latter judgment was set aside by the Court of Justice in case C-360/92, *The Publishers Association v. Commission*, [1995] ECR I-23, paras. 30-32, 42, because, although the Commission was not bound by the pre-existing decision of the national competition authority in question, which had applied national competition law, it nevertheless did not reason its departure from the national authority's findings, although the addressee of the Commission decision had raised this specific plea during the administrative proceedings.

³³⁰ The only problem in this case lay in the sanctions and in the *non bis in idem* principle.

³³¹ See e.g. Corte di cassazione, 30-6-01, n° 8887, which held that Italian competition law could apply to practices that had been considered in the *Bagnasco* judgment of the ECJ as not satisfying the inter-state trade effect criterion.

³³² See Stockmann, "EEC Competition Law and Member State Competition Laws", in: Hawk (Ed.), *North American and Common Market Antitrust and Trade Laws 1987, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1988), pp. 291-293; Lieberknecht, "Das Verhältnis der EWG-Gruppenfreistellungsverordnungen zum deutschen Kartellrecht", in: Freiherr von Gramm, Raisch & Tiedemann (Eds.), *Strafrecht, Unternehmensrecht, Festschrift für Gerd Pfeiffer* (Köln/Berlin/Bonn/München, 1988), p. 596; Klaue, "Einige Bemerkungen über die Zukunft der Zweischrankentheorie", in: Baur, Hopt & Mailänder (Eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13 März 1990* (Berlin/New York, 1990), p. 985; Schröter, *supra* (2003), p. 151; *contra* M. Furse, *Competition Law of the UK and EC* (London, 2000), pp. 30 and 275. According to one view, which had later been largely surpassed, not all individual exemptions should be considered "positive" measures and one had to proceed to an *ad hoc* examination of the specific exemption decision, in order to ascertain whether it was a measure expressing the Community economic policy (see Markert, "Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC", 11 CMLRev. 92 (1974), pp. 96-97; for a revival of that view see

such "positive" measures, with most authors believing that they were, thus pre-empting stricter national law.³³³

On the other hand, negative clearance decisions³³⁴ and comfort letters with the characteristics of either of a negative clearance or an exemption³³⁵ were not covered, and could therefore not

Lane, *supra* (2000), pp. 216-217). Another view, which had not had many followers, propagated that the quality of an individual exemption as a "positive" measure meant that national competition law could not affect the core of the Community measure as such, but could, nevertheless, exercise control over the undertakings' eventual abusive conduct subsequent to the exemption (theory of the core, *Kernbereichslehre*; see Rehbinder, "Der Vorrang des EG-Kartellrechts vor nationalem Kartellrecht bei Freistellungen: Dogmatische Konstruktion, Sachargumente und politische Interessen", in: Immenga, Möschel & Reuter (Eds.), *Festschrift für Ernst-Joachim Mestmäcker zum 70. Geburtstag* (Baden-Baden, 1996), p. 716). See also Zekoll, "European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective", 24 *Vand.JTransnat'IL* 75 (1991), p. 99, with further references to early views of the Commission, which also seemed to favour the theory of the core, by holding that a national prohibition should not affect the substance of an exemption. The same author concludes that German courts have not accepted easily the supremacy of Community over national competition law (*idem*, p. 101 *et seq.*; see also Braun, *supra* (1996), p. 455 *et seq.*). On the early views of the Commission see *Commission IVth Report on Competition Policy - 1974* (Brussels/Luxembourg, 1975), p. 34.

³³³ See AG Tesaro's Opinion in case C-70/93, *Bayerische Motorenwerke AG v. ALD Auto-Leasing D GmbH*, [1995] ECR I-3439: "the [group] exemption granted to [agreements] cannot but prevent the national authorities from ignoring the positive assessment put on them by the Community authorities. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of a Community measure - which an exemption under Article 85(3) [now 81(3)] undoubtedly is - would also be disregarded" (paras. 38-39). See also Lieberknecht, *supra* (1988), pp. 597-599; M. Goulinopoulou, *Regulation EEC/556/89 on Know-How Licensing* (Athens/Komotini, 1989) [in Greek], pp. 80-81; Klaue, *supra* (1990), p. 985; Anagnostopoulou and Klefodimou, *supra* (1992), p. 186; Zekoll (albeit with some qualifications), *supra* (1991), p. 105 *et seq.*; Tesaro, *supra* (2000a), p. 4; Schröter, *supra* (2003), p. 151; Petsche and Rinne, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003), p. 130; *contra* Stockmann, *supra* (1988), p. 291 *et seq.* It is interesting to note the words used by AG Van Gerven in his Opinion in *Delimitis*, *op.cit.*, para. 5: "The issue of [a block] exemption is an *act of policy* which falls within the exclusive competence of the Commission" (emphasis added). Doubts have been expressed as to the "new generation" block exemption Regulations, which do not contain "white lists" of permitted clauses, therefore, the argument went, could not be "positive" measures that can supersede national competition law. This was, however, a very formalistic view of the new Regulations. See Tzouganatos, *supra* (2001), pp. 127-128, who, referring to Reg. 2790/1999, stresses that, notwithstanding the absence of a "white list", the conditions for the block exemption are sufficiently precise and, therefore, express in a positive way the Community competition policy on the field. The view that national stricter law could sometimes supersede block exemption regulations relied on certain Recitals of some old Regulations that were leaving some leeway to stricter national law (e.g. Recital 19 Reg. 1984/1983; Recital 29 Reg. 123/1985; Recital 13 Reg. 4087/1988). See further Soufleros, *supra* (1989), p. 308 *et seq.* However, other authors stress that the exceptional existence of these permissive Recitals meant that in principle block exemption regulations pre-empted national law (Lieberknecht, *supra* (1988), p. 599). In any case, such references are no longer found in the new Regulations, which now state clearly in their Recitals that "in accordance with the principle of primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including [the relevant] Regulation" (Recital 17 Reg. 2790/1999; Recital 19 Reg. 2658/2000; Recital 23 Reg. 2659/2000; Recital 29 Reg. 358/2003).

³³⁴ See Galinsky, "The Resolution of Conflicts Between UK and Community Competition Law", 15 *ECLR* 16 (1994), p. 18; Schröter, *supra* (2003), p. 153.

³³⁵ See e.g. Bechtold, "Antitrust Law in the European Community and Germany: An Uncoordinated Co-existence?", in: Hawk (Ed.), *International Antitrust Law and Policy 1992, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1993), pp. 349-350. In cases 253/78 and 1/79 to 3/79, *Procureur de la République v. Giry and Guerlain et al.*, [1980] ECR 2327, para. 18, the Court went on to stress that a comfort letter "cannot by itself have the result of preventing the national authorities from applying to those agreements provisions of national competition law which may be more rigorous than Community competition

restrict the application of national competition law. However, in recent years this latter view has been criticised as formalistic, since a negative clearance might well express the Community competition policy in a precise way, for example if the Commission considered that an agreement did not restrict competition at all.³³⁶ Another argument was that it seemed paradoxical to protect agreements restrictive of competition which had been granted an exemption against national law, but not to do the same for agreements that were less restrictive or not restrictive at all.³³⁷ The same could be true for comfort letters, especially those having the form of an individual exemption, which presented many of the characteristics of “positive measures”.³³⁸

cc. The Relationship between National and Community Competition law – The Supremacy Rule of Article 3 of Regulation 1/2003

law in this respect”. According to the dominant view, national competition law could also apply to and prohibit agreements notified to the Commission under the opposition procedure of Art. 4 of the old Reg. 240/1996 on technology transfers, if the Commission did not object thereto within four months of their notification. See, however, Lieberknecht, *supra* (1988), p. 600, who equated the Commission’s non-opposition to an individual exemption and denied, therefore, the application of stricter national law.

³³⁶ See e.g. Kovar, “Intervention : Les conflits dans la réglementation des pratiques restrictives de concurrence entre l’ordre juridique communautaire et l’ordre juridique français”, in: *Les conflits des réglementations dans le droit français et le droit communautaire des pratiques restrictives de concurrence, Journées d’étude de droit de la concurrence (Lyon 24 et 25 mai 1984)* (Lyon, 1985), pp. 192-193; Ulrich, “Harmonisation within the European Union”, 17 ECLR 178 (1996), p. 181. The adoption by the Commission in a negative clearance of a rule of reason approach could attach to that decision the character of a “positive measure” that expressed the Community competition policy in the *Walt Wilhelm* sense. See in this sense Munari, *supra* (1992), p. 38.

³³⁷ See in this sense Lieberknecht, *supra* (1988), p. 601 *et seq.*; Walz, “Rethinking *Walt Wilhelm*, or the Supremacy of Community Competition Law over National Law”, 21 ELRev. 449 (1996), p. 455. Compare also AG Tesouro’s Opinion, para. 59, in case C-266/93, *Bundeskartellamt v. Volkswagen and VAG Leasing*, [1995] ECR I-3477. See also Wesseling, *supra* (1999), p. 427, who rightly used the argument of the changed circumstances, to stress that the *Walt Wilhelm* era divergencies of objectives between national and EC competition laws were no longer existent, therefore a negative clearance under Art. 81(1) EC should have a certain value in national competition law. However, if the negative clearance stated that Article 81(1) EC is not applicable, because the agreement did not have an appreciable effect on inter-state trade, then naturally national competition law could prohibit that agreement.

³³⁸ See Schwarze, “Die Auswirkungen des Vorrangs des Gemeinschaftsrechts auf das deutsche Kartell- und Wettbewerbsrecht”, 51 JZ 57 (1996), pp. 62-63; Schröter, *supra* (2003), p. 100. Compare case C-376/92, *Metro SB-Großmärkte GmbH & Co. KG v. Cartier SA*, [1994] ECR I-15, where the Court essentially held that a distribution system that had been considered compatible with EC competition law through a Commission comfort letter should not be prohibited under German competition law. That case concerned a specific principle of German unfair competition law, under which a selective distribution system can be enforced as against persons that have assumed obligations under the contract, only if the system is “impervious” (*lückenlosig*), i.e. unauthorised dealers can obtain the goods covered by that system only by participating in the breach by an authorised dealer of his contractual obligations. If the lack of “imperviousness” of the system leads to competition against authorised dealers from independent dealers, the manufacturer will no longer be able to compel the members of his network to comply with their contracts. The Court’s approach was that to make the validity of a selective distribution system under Art. 81(1) EC conditional on its “imperviousness” would lead to the paradoxical result that the most inflexible and most tightly sealed distribution systems would be treated more favourably under Art. 81(1) EC than distribution systems that are more flexible and more open to parallel transactions.

A basic fear that emerged after the publication of the White Paper referred to the risk of re-nationalisation of competition law enforcement in Europe.³³⁹ The argument was that under a system of legal exception Article 81(3) EC would implicitly be devoid of any policy discretion included therein, and there would no longer be exemption decisions of a constitutive nature which could have been considered “positive” measures in the *Walt Wilhelm* sense. Instead, all decisions of inapplicability would have the character of a negative clearance of a declaratory nature, meaning that according to that case law and the dominant double barrier theory, the application of stricter national competition law could not be excluded.³⁴⁰ The same would hold true for block exemption regulations, which would essentially be “block negative clearances”.³⁴¹ National competition authorities and courts would therefore have an incentive under the new system to discard EC and instead apply national competition law, thus prohibiting agreements which under EC competition law would be legal.³⁴² In addition, the Commission had lately been following a more economic approach to the notion of restriction of competition, with the result that fewer agreements reached the stage of Article 81(3) EC scrutiny. This would mean that the permission of such agreements under the first rather than the third paragraph of Article 81 EC would not qualify as a “positive” measure in the *Walt Wilhelm* sense, so the possible application of stricter national law could not be excluded.³⁴³

Re-nationalisation of competition law enforcement would also be the result of the companies’ own drive to notify agreements nationally thus making up for some of the legal certainty benefits lost through the abolition of the Community notification system. Thus, some commentators expected companies, in cases of concurrent applicability of Community and national law, to notify nationally so as to get a strategic advantage.³⁴⁴ This, however, would weaken the effectiveness of the new system of legal exception.

³³⁹ See e.g. Ehlermann, *supra* (2000b), p. 1; *idem*, “Artikel 3 des Kommissionsvorschlags vom September 2000 - Wohlbegründet!”, Kommentar, 51(3) WuW (2001); Idot, *supra* (2001a), pp. 348-351.

³⁴⁰ See Wesseling, *supra* (1999), pp. 430-431; Ellger, *supra* (2001), p. 291; Mestmäcker, *supra* (2001), pp. 239-240; Venit, *supra* (2001), pp. 462-463.

³⁴¹ Some authors have even gone as far as to argue that such “block negative clearances”, which will have a declaratory character, cannot oust national competition law, thus being in essence “pseudo-regulations”.

³⁴² See also Tesauro, *supra* (2001), p. 266, stressing the need to activate NCAs to resort to EC rules through a realignment of the relationship between Community and national competition laws.

³⁴³ See Paulis and Gauer, *supra* (2003), p. 67; Paulis, *supra* (2001b), pp. 21-22, rejecting the idea of a competition among substantive competition laws because this would constitute a multiplicity of barriers to the detriment of companies.

³⁴⁴ See e.g. Folguera, “The Impact of the Commission’s Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws”, in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001), pp. 168-170.

To assuage these fears, the Commission included for the first time in its official regulation proposal of September 2000 a specific provision (Article 3), which provided for the exclusive application of EC competition law - if the inter-state trade effect criterion was satisfied - by all enforcers, thus, also by national competition authorities and courts.³⁴⁵ This provision was strongly opposed by many commentators and, in particular, by some national competition authorities, because it was alleged that it would lead to the near-total neutralisation of national competition law.³⁴⁶ In the course of the negotiations in the Council it became the main point of friction between the Commission and some Member States. Eventually, a compromise was reached in the Council and the new Regulation as adopted includes an obligation for national competition authorities and national courts to apply Articles 81 and 82 EC concurrently with their national competition law³⁴⁷ if the inter-state trade effect criterion is satisfied. More importantly, the new provision excludes the application of stricter national competition law to agreements not falling under Article 81 EC as a whole or which are covered by a block exemption regulation.³⁴⁸

³⁴⁵ While the White Paper had not included a proposal to that effect, the Commission officials had on many occasions in the past alluded to such a possibility. See e.g. Schaub, *supra* (1999), pp. 149-150.

³⁴⁶ See Arhel, "Modernisation des règles communautaires relatives à la mise en œuvre de l'interdiction des ententes et abus de position dominante (publication du nouveau règlement)", *Petites Affiches*, 2-4-2003, No. 66, 6, p. 8.

³⁴⁷ Art. 3(1) Reg. 1/2003. Note that the letter of this provision imposes the application of *Community* competition law, if *national* competition law is applied to conduct affecting inter-state trade, but this obligation does not naturally go *vice versa*. In other words, it does not mean that the national authority or court must apply its *national* competition law concurrently when it applies *Community* law; it remains free to discard the former and apply only the latter, if it so prefers. See Director General Lowe, "European Competition Rules: The New Enforcement System for Articles 81 and 82 EC Is soon to Be Reality", Article for KANGAROO Group Newsletter, September 2003, in: <http://europa.eu.int/comm/competition/speeches>, p. 2, stressing that "of course [national courts and NCAs] may also apply Articles 81 and 82 on a stand-alone basis". The aim is the application of EC law be it exclusively or, at the very least, concurrently with national law. Another point to be made here, is that this provision does not affect the national competition authority's discretion - if such a discretion exists under its national law - to act. There is only a duty to apply EC competition law, *only if* that authority decides to act. This point does not apply to national courts, which, as *juges communautaires de droit commun*, are under a duty to apply EC competition law in all cases, where it is applicable, even *ex officio*, under the *Van Schijndel* principles (cases C-430/93 and C-431/93, *Jeroen Van Schijndel and Johannes Nicolaas Cornelis Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705). However, as we argue below, Art. 3 does not alter the *Van Schijndel* principles.

³⁴⁸ Art. 3(2) Reg. 1/2003. However, unilateral conduct permitted under Art. 82 EC can still be prohibited under stricter national rules on abuse of a dominant position or of economic dependence (as is, for example, the case in German, Greek, and French law). See also Recital 8 *in fine* of the new Regulation. A question arises as to the definition of what constitutes such "unilateral conduct", as there are some situations that can be categorised as subject both to the rules on agreements, concerted practices and decisions and to the rules on the abuse of dominant position. Such is the case of selective distribution systems, where the relationship between producers and non-appointed dealers may be thought of as subject to rules on unilateral conduct. It appears, however, that such a reading of Art. 3(2) Reg. 1/2003 would not be in conformity with its spirit (see in this sense Wirtz, "Anwendbarkeit von § 20 GWB auf selektive Vertriebssysteme nach Inkrafttreten der VO 1/2003", 53 WuW 1039 (2003), pp. 1043-1044). In addition, under Art. 3(3) the application of Community competition law does not preclude the application of national provisions that predominantly pursue an objective different from that pursued by Arts. 81 and 82 EC. This refers basically to national unfair competition laws (see Recital 9). See Martinez Lage, "Editorial: Cambio de cultura: Aprobada, al fin, la reforma de las normas de aplicación

The text of Article 3 of Regulation 1/2003 certainly marks great progress if compared with the post-*Walt Wilhelm* state of the law, which was neither very clear nor satisfactory. There are two basic advantages. The first is that national competition authorities and courts must now apply the competition provisions of the Treaty along with their national laws³⁴⁹ if there is an effect on trade between Member-States. This will undoubtedly lead to a “communitarisation” of competition enforcement by these authorities and courts.³⁵⁰ They can no longer ignore EC competition law if it is applicable. Instead, they will have to enforce it in parallel with their national competition laws,³⁵¹ thus indirectly becoming subject to the specific Community law obligations and duties imposed by Articles 11, 12, 13, 15 and 16 of Regulation 1/2003, mainly as against the Commission.³⁵²

This will mean that the enforcer in question will have to begin by examining whether EC competition law is applicable in the first place, in particular whether the inter-state trade

de los artículos 81 y 82 CE”, (2003-1/2) GJ 3, pp. 6-7; Idot, “Premières vues sur le nouveau règlement de mise en œuvre des articles 81 et 82 CE”, (2003-2) *Europe* 4, p. 6. Of course, it will not always be easy to establish what the objective is in a national rule and if this falls under “competition law”; see in this regard Lever, “The Commission’s Proposals for the Modernisation of EC Competition Law: The Relationship between Articles 81 and 82 EC and National Competition Laws”, in: *Lawyers’ Europe*, Autumn/Winter 2001, 2, pp. 4-5. See also the critical comments by H. Ullrich, *Anti-unfair Competition Law and Anti-trust Law: A Continental Conundrum?*, EUI Working Paper, Law No. 2005/1, p. 5 *et seq.* Finally, it would seem that Community competition law would not preclude employing provisions in national civil codes prohibiting the abuse of rights in refusal to deal cases, thus attaining a result similar to that under the application of the “essential facilities” doctrine of EC competition law. See e.g. Hatzopoulos, *supra* (2002), p. 168 *et seq.*; compare, however, Mavroidis and Neven, “*Bronner Kebab: Beyond Refusal to Deal and Duty to Cooperate*”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?* (Oxford/Portland, 2006), p. 366.

³⁴⁹ As mentioned above, the duty to apply EC competition law is not a novelty for national courts, which are bound to do so by the direct effect of Arts. 81 and 82 EC, according to the Court’s case law (*BRT v. SABAM (I)*, *op.cit.*, para. 16, at 62: “the prohibitions of Articles 85 and 86 tend by their very nature to produce direct effects in relations between individuals [and] create rights directly in respect of the individuals concerned which the national courts must safeguard” – emphasis added). See also below on the duties of national courts to apply EC competition law *ex officio*.

³⁵⁰ See Gerber and Cassinis, *supra* (2006), p. 12.

³⁵¹ There should be no distinction as to the duty to apply Community competition law between civil courts and courts exercising a judicial review of NCAs’ decisions. The latter, too, should apply Community law, even if the NCA in its decision did not. Compare, however, the position of the Commission in case C-238/05, *ASNEF-EQUIFAX, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (AUSBANC)*, currently pending, as reported in para. 17 of AG Geelhoed’s Opinion. The Commission, there, argued that a national court that reviews a NCA’s decision that has not applied Community competition law (in that case the NCA was deciding before the coming into force of Reg. 1/2003 was not formally bound to apply EC law) has neither the duty nor, indeed, the power to apply Community competition law. Such an approach, however, does not favour the *effet utile* of Art. 3(1) Reg. 1/2003.

³⁵² Particularly NCAs will find themselves in the future, as a result of Art. 3 of Reg. 1/2003, more and more subject to the Network of competition authorities, with the Commission having the central role. This point is also made by Paulis and Gauer, *supra* (2003), p. 67. Naturally, this has led some commentators to speak of centralisation rather than of decentralisation of competition law enforcement. See e.g. Mestmäcker, *supra* (2000b), pp. 403, 443; Böge, “Stellungnahme zur Reform der europäischen Wettbewerbsregeln zur Anhörung des Ausschusses für Wirtschaft und Währung des Europäischen Parlaments am 27. Februar 2001”, Unpublished Paper (27-2-01), p. 4; Claudel, “Pratiques anticoncurrentielles : À propos du règlement CE n° 1/2003 du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux Articles 81 et 82 CE : Une réelle décentralisation du droit de la concurrence ?”, *Petites Affiches*, 20-5-2003, No. 100, 7.

effect criterion is established.³⁵³ If there is such an effect, the national court or authority will be faced with a whole array of autonomous concepts of Community law, ranging from the most basic ones of what constitutes an “agreement”, a “concerted practice” or an “anti-competitive object or effect”, to the complex concepts of “foreclosure” and “essential facilities”. These concepts will have to be interpreted and applied according to Community competition law.³⁵⁴

The second advantage of Article 3 is that it does not use the “positive measure” criterion which led to lengthy debates in the past. Instead it opts for much clearer language, excluding from the ambit of national competition law agreements, decisions by associations of undertakings, and concerted practices which do or might affect inter-state trade, but either do not restrict competition under the first paragraph of Article 81 EC, or fulfil the conditions of the third paragraph, or are covered by a block exemption regulation. The progress attained is evident, since the dominant view in the past was that negative clearance decisions based on Article 81(1) EC, because of their declaratory character, could not exclude the application of stricter national law. In addition, the letter of Article 3 does not require that Article 81 EC *has already been declared inapplicable* through a decision or comfort letter in order to exclude stricter national competition law, which will be excluded *a priori*, if the behaviour in question *is merely subject to Article 81 EC*.³⁵⁵ Thus national competition law will not apply even in

³⁵³ As an indirect result, there will be a streamlining in the way NCAs and national courts apply EC competition law, with positive results for the latter’s consistent and uniform application. In Greece, for example, the Competition Committee - and even courts - have been applying cumulatively Greek and EC competition law sometimes, without ever examining whether the requirements for the latter’s application were satisfied. In some cases it is not certain whether the authority or the court really *applied* the EC competition rules, or whether they used them as an interpretative tool, since the Greek law is basically a word-by-word transplant of Arts. 81 and 82 EC. Such “application” of Community competition law might lead to inconsistencies in the future decentralised system of enforcement. For examples of this practice of the Greek authorities and courts see Greek Competition Committee n° 53/1987 (*Blythe Colours II*), where a national individual exemption was given to an agreement thought to fall under the old Reg. 1983/1983; Greek Competition Committee n° 63/1988 (*K. I’oreopoulos*), “applying” the same block exemption Regulation to an agreement covering the Greek island of Rhodes (!) without any examination of Community law’s applicability in the first place; Greek Competition Committee n° 75/1989 (*Toyota I*), speaking of “non-direct application” of the old Reg. 123/1985; Greek Competition Committee n° 45/1996 (*Lacoste*), applying cumulatively national competition law, Art. 81 EC and the old Reg. 1983/1983, but only declaring the non-applicability of Art. 1(1) L. 703/1977 (equivalent to Art. 81(1) EC) in the operative part; Dioikitiko Protodikeio Athens n° 3254/1991, in: D. Koutsoukis and D. Tzouganatos, *The Application of L. 703/1977 ‘on the Protection of Free Competition’*, Vol. III, 1990-1995 (Athens, 1996) [in Greek], p. 220 *et seq.*; Dioikitiko Efeteio Athens n° 68/2002, 22 RHDE 978 (2002), with critical comments by Hatzioannou, 22 RHDE 984 (2002) [in Greek], p. 986. On the impact of block exemption regulations on Greek national competition law enforcement see also Dryllerakis, “The Relationship Between Block exemption Regulations and National Competition Law”, 50 *Epitheorisi Emporikou Dikaioy* 447 (1999) [in Greek].

³⁵⁴ See Hirsch, *supra* (2003), p. 244.

³⁵⁵ In this sense, Art. 3 Reg. 1/2003 moves from the “procedural precedence” of *Walt Wilhelm*, according to which the application of stricter national competition law is blocked only by the action of the Commission, to a “normative precedence”, where stricter national law is blocked by the mere applicability of permissive Community competition law. On the successful term of “procedural precedence” see R. Walz, *Der Vorrang des*

the case of agreements falling under the new *de minimis* Notice, as long as they satisfy the inter-state trade effect condition.³⁵⁶ Under the old *Walt Wilhelm* state of affairs it was possible for stricter national competition laws to catch agreements subject to Community competition law but permitted under the *de minimis* rule. It is noteworthy that the current *de minimis* Notice deals only with the appreciation of whether an agreement restricts competition, and not also of its effects on inter-state trade,³⁵⁷ as was the case with the earlier *de minimis* Notices. Without Article 3 of Regulation 1/2003, a whole array of agreements satisfying the inter-state trade effect jurisdictional criterion but considered minor by Community law could nevertheless have been prohibited under national competition law, which would have been unfortunate.³⁵⁸

The same holds true for agreements which according to other Commission soft law pronouncements, such as notices or guidelines³⁵⁹ may fall outside the scope of Article 81(1) EC, and as such have not been block-exempted by means of a regulation. While such agreements could previously be prohibited under national competition law,³⁶⁰ under Article 3 of Regulation 1/2003 they will be immune from prohibition, since they are not considered incompatible with Article 81 EC as a whole.³⁶¹

europäischen vor dem nationalen Kartellrecht (Baden-Baden, 1994), p. 226 *et seq.*; *idem*, *supra* (1996), p. 451; Rehinder, *supra* (1996), p. 713; Kingston, "A 'New Division of Responsibilities' in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC?: A Warning Call", 22 ECLR 340 (2001), p. 342.

³⁵⁶ See Arhel, *supra* (2003), p. 9.

³⁵⁷ The Commission opted to issue a separate Notice on inter-state trade effects because it thought that market share thresholds of the level of the *de minimis* Notice were not good indicators on their own of what is an appreciable effect on trade between Member States. Indeed, the Notice defines the appreciable effect on trade by means of a turnover threshold combined with a much lower market share threshold (5% - see *supra*). See Peepkorn, "Revision of the 1997 Notice on Agreements of Minor Importance (*De Minimis* Notice)", (2001-2) *EC Competition Policy Newsletter* 4, pp. 4-5; *idem*, "New Notice on Agreements of Minor Importance (*De Minimis* Notice)", (2002-1) *EC Competition Policy Newsletter* 45.

³⁵⁸ For example, in case of a vertical restraint, an agreement, in which the supplier has a market share between 15% and 30%, would benefit from the block exemption of Reg. 2790/1999 and would not be caught by stricter national competition law, whereas an agreement, in which the supplier has a lower market share, i.e. below 15%, might be prohibited under national competition law! The same would be true for specialisation or research and development agreements with market shares between 10 % and 20 % or between 10 % and 25 % respectively, which could not be prohibited under national laws, whereas those agreements falling under the 10% market share might be prohibited. But see Van Oers, "The Way Ahead for the Commission's Modernisation Plans: Position of the Netherlands Competition Authority", in: *European Competition Law: A New Role for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers* (Bruxelles, 2001), pp. 59-60, for the opposite view from an NCA perspective. The author finds that it would be hard to accept the legality under the Community *de minimis* rule of an anti-competitive agreement that affects trade among Member States, while a similar or even less significant agreement that does not affect inter-state trade could be found illegal under national competition law.

³⁵⁹ "Block negative clearances" in the words of R. Joliet, *Le droit institutionnel des Communautés européennes, Les institutions, les sources, les rapports entre ordres juridiques* (Liège, 1983), p. 188.

³⁶⁰ See Koutsoukis, "The Relationship between Community and National Competition Law", 4 RHDE 513 (1984) [in Greek], pp. 536-537.

³⁶¹ See in this sense Blaise and Idot, *supra* (2003a), p. 297. An example can be given through Reg. 2790/1999 and the Guidelines on Vertical Restraints. While the former deals only with agreements that are

Of course, in all these cases the national authority or court may have its own views as to the applicability to the agreement in question of the *de minimis* Notice or of other Commission notices and guidelines. However, these will be conflicts on the application of *Community* competition law,³⁶² which is different from the issue of the conflict between *Community* and *national* competition law.³⁶³

b. The New Institutional Position of National Competition Authorities and the European Competition Network

aa. The Powers of NCAs under the New System

The new decentralised system of competition enforcement will have important consequences not only for private, but also - indeed, one may argue, primarily - for public enforcement at the national level. National competition authorities will have the power³⁶⁴ and the duty³⁶⁵ to

examined under Art. 81(3) EC, the latter refer also (in section II) to agreements that are not falling under Art. 81(1) EC altogether, such as minor agreements, agreements between small and medium-sized undertakings and agency agreements (see further Whish, "Regulation 2790/99: The Commission's 'New Style' Block Exemption for Vertical Agreements", 37 CMLRev. 887 (2000), pp. 887-888, 897). Under the *Walt Wilhelm* principles the former would be immune of the national law prohibition, while the latter could well be so prohibited. Again, hardly a consistent result.

³⁶² On the avoidance and resolution of such conflicts, see *infra*.

³⁶³ It is therefore not entirely appropriate to speak of a "binding effect" of these Commission soft law instruments on national courts and competition authorities. On this general question see Schweda, "Die Bindungswirkung von Bekanntmachungen und Leitlinien der Europäischen Kommission", 54 WuW 1133 (2004), p. 1139 *et seq.*

³⁶⁴ Art. 5 Reg. 1/2003 provides that "the competition authorities of the Member States *shall have the power* to apply Articles 81 and 82 of the Treaty in individual cases" (emphasis added). It is clear from this provision that this empowerment is given directly to NCAs by Community law. Of course, co-operation by the Member States is also required to deal with the technicalities entailed when national public authorities apply EC competition law. Thus, Art. 35(1) requires Member States to designate the authorities responsible for the application of the pertinent Community rules. However, the fact that this provision and Recital 35 of the new Regulation refer to Member States' measures *designating* and *empowering* NCAs to apply those provisions does not alter the substance of our first observation. It remains clear that Reg. 1/2003 deals with *if* (question of principle), while national measures deal with *which* national authorities apply EC competition law and *how* (procedural and technical issues). See in this sense Cooke, *supra* (2001b), p. 14; *contra*, i.e. in favour of Member States' competence to empower national authorities, Idot and Van de Walle de Ghelke, *supra* (2001), p. 195. It is interesting to note here that under the old system of enforcement there has also been a debate as to whether NCAs had to be expressly empowered by national law to apply the Treaty competition rules or whether they had the power to do so directly from Community law. While the Commission had sometimes opined that national empowerment of NCAs was a necessary requirement for the latter to apply Community law (see e.g. para. 15 of the 1997 co-operation Notice), many authors had argued that NCAs were already empowered and bound by Community law itself to do so (Art. 84 EC in conjunction with Art. 9(3) Reg. 17/1962). See e.g. Munari, *supra* (1992), pp. 612-613; *idem*, "Ambito di applicazione e rapporti con l'ordinamento comunitario", in: Afferni (Ed.), *Concorrenza e mercato, Commento alla Legge 10 ottobre 1990 n. 287 e al Decreto 25 gennaio 1992 n. 74* (Padova, 1994), pp. 23-24; Ehlermann, *supra* (1995d), p. 51; Waelbroeck, "Panel Discussion: EC Competition System: Proposals for Reform", in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), p. 216; Günther, "Österreich", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, Denmark, Sweden, Finland and Austria

apply Articles 81 and 82 EC. According to Article 5 of the new Regulation, they may take the following types of decisions:

- (a) prohibition decisions ordering that an infringement be brought to an end,
- (b) interim measures,
- (c) decisions accepting commitments,
- (d) decisions imposing fines and other penalties, and
- (e) decisions stating that there are no grounds for action on their part.

What has been decentralised to those authorities is not the power to grant exemption decisions,³⁶⁶ since the legal exception system has made the very concept of exemption obsolete. Instead, they will be enforcing Article 81 EC in its totality. Of course, companies can still notify agreements to NCAs, since nothing in Regulation 1/2003 prohibits this, but in such cases the NCAs are not able to grant a negative clearance or an exemption but only to state in their decision that there are no grounds for them to act, as indeed recognised by Article 5 of Regulation 1/2003.³⁶⁷

(Baden-Baden, 2001), p. 345); Tesouro, *supra* (2000b), p. 158 *et seq.*; contra Iliopoulos, "Griechenland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. V, *Spain, Portugal and Greece* (Baden-Baden, 2000), p. 241 *et seq.*; compare the more balanced approach of Bourgeois, *supra* (1997), pp. 90-92). See also Saggio, *supra* (1997), p. 5, who even believes that national empowering legislation may not only be superfluous but also contrary to EC law. A duty to apply Community competition law would arise also under Art. 10 EC (see Temple Lang, *supra* (1999), p. 13; *idem*, *supra* (2000), p. 16). This is the standard rule for all directly effective provisions of Community law, which are to be enforced by national public authorities and courts alike. As to public authorities see e.g. case 103/88, *Fratelli Costanzo SpA v. Comune di Milano*, [1989] ECR 1839, paras. 29-31; case C-198/01, *CIF Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055. Therefore, even without national empowerment NCAs had the power and, indeed, the duty to apply the directly effective provisions of Arts. 81 and 82 EC, using their national procedural rules. However, it was also accepted that by virtue of the principle of legality such NCAs could not impose sanctions to natural or legal persons while enforcing EC competition law. See on this issue Todino, *supra* (1998), p. 759, fn. 17. In any case, the issue has become now obsolete, since there is in the new Regulation an express provision (Art. 5), which leaves no further doubts.

³⁶⁵ For the duty of NCAs to apply EC competition law, as prescribed in Art. 3 Reg. 1/2003, see above.

³⁶⁶ See Wils, *supra* (2001), p. 342.

³⁶⁷ See Gauer, "Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004), p. 195. See, however, Folguera, *supra* (2001), p. 168, according to whom NCAs could still issue negative clearance decisions. Such a view is probably the product of confusion. In any event, the prospective amendment of national competition laws that will mirror the Community abolition of the notification and authorisation system will lead to the complete disappearance of the notification procedure in Europe. It is interesting to note that in the UK one of the compelling arguments for abolishing the system of domestic notification is exactly the likelihood of undertakings' - indeed from across the EU - seeking to notify agreements under domestic competition law, in order to attain in the UK a certain degree of comfort that has been lost under the new EC system. See Department of Trade and Industry, *op.cit.*, paras. 3.19-3.20. Of course, some national competition laws have remained unreformed. Thus, for example, the 2005 amendment of the Greek Competition Act has left untouched the system of administrative authorisation and notification. See the critical comments by Komninos, "The New Amendment of the Greek Competition Act: Harmonisation with or Departure from the EU Model?", 27 ECLR 293 (2006).

It is noteworthy that national authorities will not have the power to take inapplicability decisions, i.e. decisions finding that certain conduct is not caught by Article 81 EC (either because the conditions of its first paragraph are not fulfilled, or because the conditions of its third paragraph are satisfied), or by Article 82 EC. Such decisions, which resemble the negative clearance of the old system, are exceptionally reserved solely to the Commission, acting on its own initiative in the Community public interest.³⁶⁸

The Regulation did not establish a "full faith and credit" principle on mutual recognition of decisions taken by NCAs.³⁶⁹ On the contrary, such decisions will be subject to territoriality, i.e. the effect of their rulings will be limited to their respective national territories.³⁷⁰

bb. Co-operation Mechanisms within the European Competition Network

A focal point of decentralisation is collaboration between NCAs and the Commission in the framework of the European Competition Network (ECN), which makes all these authorities subject to specific duties of co-operation and consultation in the enforcement of Community competition law.³⁷¹ Its main objective will be to ensure an efficient work sharing between the public enforcers and to promote a coherent application of the EC competition rules.³⁷² While the Network should not be viewed in hierarchical terms,³⁷³ there is no doubt that the

³⁶⁸ Art. 10 Reg. 1/2003. At least as far as Arts. 81(1) and 82 EC are concerned, this is a retrogression for NCAs, as they always had the possibility to grant such negative clearances under the old system of enforcement.

³⁶⁹ See Paulis, *supra* (2001b), p. 19.

³⁷⁰ See on this issue Montag, "The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View", in: Ilawik (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), pp. 175-176; Idot, "L'efficacité des décisions dans l'espace", *Petites Affiches*, 28-12-2000, No. 259, 29, pp. 33-34; Greaves, "EC Competition Law: Centralised or Decentralised Enforcement", *Focus*, [2000] 11 Euro.CL xi, p. xiv; Bourgeois, "Decentralised Enforcement of EC Competition Rules by National Competition Authorities: Some Remarks on Consistency, Coherence and Forum Shopping", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 332; Mestmäcker, *supra* (2001), p. 237; Idot, *supra* (2001a), p. 344; Immenga, "Coherence: A Sacrifice of Decentralisation?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 588; Miram, *supra* (2001), p. 23; Ehlermann and Komninos, "The Consequences of the Proposed Modernisation of the Community Competition Law Enforcement", 21 RHDE 745 (2001) [in Greek], p. 760; Tesauro, in: *The 2002 Handbook of Competition Enforcement Agencies, A Global Competition Review Special Report*, p. 53.

³⁷¹ On the European Competition Network see Paulis and Gauer, *supra* (2003), pp. 65-73; Böge, "Das Netzwerk der EU-Wettbewerbsbehörden nimmt Gestalt an: Anforderungen an das Bundeskartellamt und Änderungsbedarf im deutschen Kartellrecht", 14 EWS 441 (2003); various contributions in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004); Burnside and Crossley, "Co-operative Mechanisms within the EU: A Blueprint for Future Co-operation at the International Level", 10 Int.TLR 25 (2004).

³⁷² See Lowe, *supra* (2003a), p. 3.

³⁷³ See e.g. Kist and Tierno Centella, *supra* (2001), p. 382, strongly against the "hierarchical" relationship. See also Lavagne, "La réforme du droit des ententes : Le règlement du 13 décembre 2002", 46 RMC 526 (2003), p. 529.

Commission will enjoy a central role in it,³⁷⁴ in conformity with its specific tasks in competition law enforcement that flow directly from the Treaty (Article 85 EC).³⁷⁵

The system established by Chapter IV of Regulation 1/2003 is not a federal one, but follows the standard Community law relationship between the supranational and the national.³⁷⁶ Thus the Commission, a supranational institution, will naturally not have the power to review directly or strike down the decisions of NCAs. However, its dominant role is apparent when viewed in light of the various co-operation and consultation mechanisms provided for and its power to relieve the national authorities of their competencies by initiating proceedings for the adoption of a decision, as enshrined in Article 11(6) of Regulation 1/2003.³⁷⁷ The Commission will only rely exceptionally on this latter provision, which reproduces Article

³⁷⁴ See Recital 34 Reg. 1/2003. In the words of some commentators the Commission will be the "head" or "remain at the centre" of the Network. See e.g. former Director General Schaub, *supra* (2001a), p. 255; Bergeron, "Antitrust Federalism in the European Union after the Modernization Initiative", 46 *Antitrust Bull.* 513 (2001), p. 531; Blaise and Idot, "Chronique concurrence (années 2000 et 2001)", 38 *RTDE* 103 (2002), p. 140; Kovar, "Le règlement du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du Traité CE", D. 2003.478, p. 484. Note the possibly significant divergence between the earlier references on the part of the Commission to a "Network of Competition Authorities" and the latest references to a "European Competition Network" (see Paulis and Gauer, *supra* (2003), p. 70). While versions of the former term indicate a certain parity among all participating competition authorities (the Commission included), this may not be true of the latter, where the addition of the adjective "European" and the suppression of the reference to authorities in plural stresses the supranational character of this network, since it is *European competition law* that will be enforced, and thus, by implication, the centrality of the Commission.

³⁷⁵ On the Commission's central role, see the groundbreaking judgment by the ECJ in *Masterfoods*, *op.cit.*, in particular para. 46.

³⁷⁶ See, however, Pace, *supra* (2004), p. 155, who fails to see the supranational model of organisation and criticises the Commission for considering the NCAs as "Community public authorities".

³⁷⁷ "Sudden death" in the words of Lever, "Panel Discussion: German and UK Antitrust Law and Policy", in: Hawk (Ed.), *International Antitrust Law and Policy 1992, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1993), p. 375. In this context see Jalabert-Doury, "Livre blanc sur la modernisation de l'application des articles 81 & 82 : Quel avenir pour le droit de la concurrence communautaire?", (1999) *RDA/IBLJ* 497, p. 504, who speaks of an intervention of the Commission that "communitarises the dossier". This, however, is not accurate, since the dossier is already "communitarised", as the NCA applies - wholly or at least partly - Community competition law, thus being subject to the rules of the Network. One relevant question is whether the NCAs can still go on applying their *national* competition law after intervention by the Commission. According to Commission officials the answer should be negative. Under this view, the combined reading of Arts 3(2) and 11(6) Reg. 1/2003 means that the opening of proceedings by the Commission in an Art. 81 EC case bars NCAs from initiating proceedings under their national competition law. This possibility remains open only with regard to abuse of dominance cases, to the extent that there are stricter national rules prohibiting unilateral conduct. See Gauer, Dalheimer, Kjolbye and De Smijter, "Regulation 1/2003: A Modernised Application of EC Competition Rules", (2003-1) *EC Competition Policy Newsletter* 3, p. 6: "It is particularly important to take note of the relationship between Article 3 and Article 11(6) according to which the competence of NCAs to apply Articles 81 and 82 is withdrawn when the Commission opens proceedings in the same case. In that case the national competition authorities can no longer comply with their obligation under Article 3(1) to apply Community competition law, which means that any case based on national law must also be closed. The only exception is where the application of stricter national competition law is not excluded". Under a more balanced view, however, this remains theoretically possible even in Art. 81 EC cases (see Idot, *supra* (2004c), p. 76). Indeed, Art. 3 Reg. 1/2003 is concerned only with conflicts between Art. 81 EC and the equivalent national provisions. It can happen that a NCA may apply its own national rule consistently with the Commission and only wishes to order a particular remedy additionally to the remedies imposed by the Commission (for example an order of publication).

9(3) of Regulation 17/1962,³⁷⁸ nevertheless, its mere existence is a very efficient safety valve in the system.³⁷⁹

Among the most important co-operation and consultation mechanisms³⁸⁰ are the general duty of co-operation;³⁸¹ the obligation of NCAs to consult the Commission at the outset of proceedings under EC competition law³⁸² and before adopting a prohibition decision, accepting commitments or withdrawing the benefit of a block exemption;³⁸³ the possibility to consult the Commission in all other cases;³⁸⁴ and the use of the Advisory Committee on Restrictive Practices and Dominant Positions to discuss a case pending before an NCA before a final decision is taken.³⁸⁵ In addition, the Commission will have two further powers at the stage of judicial review of decisions by NCAs: Firstly, it will always be able to initiate proceedings and adopt a decision which a national court reviewing the decision of the national authority will have to respect pursuant to Article 16(1) of Regulation 1/2003; secondly, it may intervene as *amicus curiae* in national judicial review proceedings.³⁸⁶

Some problems might arise from divergences in the procedural framework applicable to NCAs.³⁸⁷ Regulation 1/2003 did not contemplate harmonising national procedural rules³⁸⁸

³⁷⁸ See *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, Doc. 15435/02 ADD 1 of 10 December 2002, in: <http://register.consilium.eu.int/pdf/en/02/st15/15435-a1en2.pdf>, point 21. According to the Joint Statement the indicative cases, where this mechanism is likely to be used are rather exceptional: "(a) Network members envisage conflicting decisions in the same case; (b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgments of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning facts, only a significant divergence will trigger an intervention of the Commission; (c) Network member(s) is (are) unduly drawing out proceedings; (d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States; (e) The national competition authority does not object." This specific point in the Joint Statement is taken up verbatim in para. 54 of the ECN co-operation Notice (see *infra*). It should be stressed that Art. 11(6) of the new Regulation had been criticised from the point of view of NCAs as going beyond what is necessary and tolerable. See e.g. Böge, "Panel Two Discussion: Broad Systemic Issues", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004), p. 169.

³⁷⁹ That this rule is intended more as a deterrent can be understood by the fact that the equivalent Art. 9(3) Reg. 17/1962 was never put directly and willingly to effect by the Commission in 40 years of antitrust enforcement. See P.J.W. Wils, *The Optimal Enforcement of EC Antitrust Law, Essays in Law & Economics* (The Hague/London/New York, 2002), p. 243.

³⁸⁰ See further on these mechanisms Gyselen, "EC Anti-trust Law Enforcement within the European Competition Network", in: *The PLC Global Counsel Competition Law Handbook 2004/5* (London, 2004), pp. 88-89.

³⁸¹ Reg. 1/2003, Art. 11(1).

³⁸² *Ibid.*, Art. 11(3).

³⁸³ *Ibid.*, Art. 11(4).

³⁸⁴ *Ibid.*, Art. 11(5).

³⁸⁵ *Ibid.*, Art. 14(7).

³⁸⁶ As to this latter possibility, see Cooke, *supra* (2001b), p. 18.

³⁸⁷ See e.g. Jones, "Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform", 22 ECLR 405 (2001), pp. 406-413, analysing the diverse procedural frameworks of the NCAs at that time. Italian law offered until very

and these will continue to apply, subject to the Community law principles of equality and effectiveness. However, the fact that NCAs will now increasingly apply the Community competition rules means that their procedural autonomy will also be increasingly called into question. This may eventually result in further calls for harmonisation of national remedies and procedures.³⁸⁹

cc. Allocation of Cases and Exchange of Information

The criteria for allocation between the members of the Network have been stipulated through the Notice on co-operation with NCAs. The absence of strict allocation criteria prescribed by law reflects the conscious and persistent choice to ensure the most efficient application of the rules.³⁹⁰ The Notice makes clear that the Commission will not be just a “clearing house” in

recently an example of possible deficits created by national procedural law inadequacies. Under national competition law, the national competition authority did not have the power to order preliminary measures, which could only be pursued in the ordinary courts. The latest amendment of the Italian Competition Act through Decreto-Legge 223/2006 has now remedied this and provides for a concurrent power of the Italian authority to order such measures. Italian authors had considered that lacuna detrimental to an effective decentralised application of the Community competition rules in Italy and stressed that under the *Factortame I* case law (case C-213/89, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd. et al. (I)*, [1990] ECR I-2433), the Italian rule should be set aside and that the NCA should be able to order such measures by direct reference to Community law. See further Todino, *supra* (1998), p. 780 *et seq.*; Pizzicaroli, “L’applicazione della disciplina comunitaria della concorrenza da parte dell’Autorità garante del mercato in Italia”, 40 *Dir.Com.* 601 (2001), pp. 616-617; Mastroianni, “La tutela dei privati nel sistema italiano di applicazione ‘decentrata’ del diritto comunitario della concorrenza”, in: Cartei & Vannucci (Eds.), *Diritto comunitario e ordinamento nazionale* (Milano, 2003), p. 155 *et seq.*

³⁸⁸ See on this issue Idot, *supra* (2001a), pp. 341-342; Nouvel, “1er mai 2004. L’entrée en vigueur du règlement 1/2003 et du ‘paquet modernisation’ portant réforme des règles de mise en œuvre des articles 81 et 82 CE”, (2004) *RDAl/IBLJ* 371, pp. 374-375; Idot, “A Necessary Step towards Common Procedural Standards of Implementation for Articles 81 and 82 EC within the Network”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004), p. 211 *et seq.*, who also addresses the rather neglected issue of the national systems for judicial review of NCAs’ decisions.

³⁸⁹ See e.g. Plompen, “Modernising EU Competition Policy: The Point of View of Undertakings”, in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001), p. 118; Mastroianni, “Osservazioni in merito alla effettività del sistema italiano di tutela ‘decentrata’ del diritto comunitario della concorrenza”, 6 *Dir.Un.Eur.* 78 (2001), pp. 87 *et seq.* Compare in this context a very interesting recent ruling of the Paris Court of Appeal, which stressed that the conditions for the granting of provisional measures by the *Conseil de la concurrence*, when the latter applies exclusively the Community competition rules, should be governed by Community and not national law: CA Paris, 26-6-02, *SA Pharma-Lab*, BOCCRF n° 8, 11-7-2003, commented by Idot, (2003-8/9) *Europe* 22. Such a solution goes further than it is required by Reg. 1/2003, which adopts the principle of national procedural autonomy and this explains that judgment’s reversal by the *Cour de cassation*: Cass.com., 14-12-04, *Pharma Lab v. Glaxosmithkline GSK and Pfizer*, LawLex200400003494JBJ, reported in and commented by L. Vogel, *Droit de la concurrence*, Vol. II, *Procédure de concurrence, Concentrations* (Paris, 2005), pp. 1259-1262. Notwithstanding the reversal, such a solution responds better to the efficiency and uniformity of Community competition law enforcement and indeed it was at the end adopted by French competition law. Thus, Art. L470-6 *Code de commerce* equips the *Conseil de la concurrence* with all procedural powers enjoyed by the European Commission under Reg. 1/2003.

³⁹⁰ See Gauer, “Les programmes de clémence au regard du réseau communautaire”, 3/2005 *Concurrences* 16, p. 16.

the sense of distributing cases to NCAs.³⁹¹ The basic principle is that members of the ECN should endeavour to re-allocate cases to a single well-placed NCA which fulfils the following cumulative conditions:

- (a) an agreement or practice has substantial direct actual or foreseeable effects on competition in the NCA's territory and is implemented in or originates on that territory,
- (b) the NCA is effectively able to bring the entire infringement to an end, and
- (c) it can gather the evidence required to prove the infringement, possibly with the assistance of other authorities.

In sum, there must be a clear link between the infringement and the territory of the NCA.³⁹²

The Commission will not initiate proceedings when a competition infringement affects the territories of only two or three Member States; in such cases the NCAs concerned should instead consider working together.³⁹³ The Commission considers it is better placed to act in cases with a wider geographical scope and some particular importance for Community law.³⁹⁴

Interestingly enough, the Commission believes that the allocation of cases does not involve a formal decision on its behalf or that of an NCA: rather, the act or failure to act in question is a preliminary step in a Community procedure, and thus not challengeable before the courts.³⁹⁵

The basic aim is to allocate cases at the outset of proceedings. Problems of allocation should be resolved promptly, normally within two months from the date of the first information sent to the ECN under Article 11 of Regulation 1/2003.³⁹⁶

The co-operation Notice envisages exchanges of information between NCAs and the Commission (via the ECN intranet) on complaints received and the initiation of proceedings. It also provides for the exchange and use of data, including confidential information, both between NCAs and the Commission and between NCAs. The information exchanged should only be used in evidence for the purposes of applying Articles 81 and 82 EC, and in respect

³⁹¹ See Schaub, *supra* (2002c), p. 39; Ratliff, "Major Events and Policy Issues in EC Competition Law, 2001-2002 - Part 2", 14 ICCLR 87 (2003), p. 108. Such a "clearing house" role for the Commission was favoured by Plompen, "Efficient Protection of Competition in an Enlarged Community through Full Association of National Competition Authorities and National Courts", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition>, p. 5.

³⁹² ECN co-operation Notice, paras. 7-8.

³⁹³ See also Schaub, *supra* (2002b), p. 107.

³⁹⁴ ECN co-operation Notice, paras. 14-15.

³⁹⁵ See Paulis and Gauer, *supra* (2003), p. 72. The Commission's fear was that giving companies the opportunity to make preliminary objections to the exercise of jurisdiction by an authority that is member of the Network would cause delay, unnecessary litigation, and expense, and make application of Community competition law less effective. See e.g. Temple Lang, *supra* (2000), p. 20. However, it cannot be ruled out that an NCA may be obliged by national law to take a formal decision subject to review by the national courts, while reallocating a case inside the Network (see Idot, *supra* (2004c), p. 66).

³⁹⁶ ECN co-operation Notice, para. 18.

of the subject matter for which it was collected by the transmitting authority. Stricter rules apply to the exchange of information which may be used to impose sanctions on individuals.³⁹⁷ The Commission and NCAs must also co-operate during various investigations, including Commission requests for information and investigations.

The position of leniency applicants is particularly problematic. The Notice considers it is in the Community interest to grant favourable treatment to undertakings which co-operate with the Commission in the investigation of cartel infringements. However, it admits that in the absence of an EU-wide system of “fully harmonised leniency programmes”, an application for leniency to one authority is not to be considered as an application for leniency to any other authority. A company seeking leniency would therefore have to apply to the Commission and all NCAs with competence to apply Article 81 EC that would likely act against the infringement in question. The problem is perhaps less acute with regard to leniency applications to the Commission, which can always relieve the NCAs of their competence by initiating proceedings, but it becomes more serious if applications for leniency are filed with NCAs under national leniency programmes. Multiple national applications for leniency to different NCAs by different companies would represent a very unfortunate scenario. One solution, favoured in the Notice, would be for an applicant to file leniency applications with all national authorities simultaneously.³⁹⁸

A related issue is the exchange between ECN members of information submitted voluntarily by an applicant for leniency. The Notice indicates that leniency-related information submitted to the Network pursuant to the co-operation and notification mechanisms of Article 11 of Regulation 1/2003 cannot be used by other Network members to start an investigation.³⁹⁹ A second safeguard is that if a Network member wants to use leniency-related information from other ECN members, they must request this under Article 12 of the Regulation, but information will not be shared without the leniency applicant’s consent, except in cases where the undertaking concerned has applied for leniency in both the authorities concerned or the receiving authority ensures the protection of the leniency applicant.⁴⁰⁰ The Commission has received written commitments in this sense from the vast majority of Member States, and has published a list of those NCAs.⁴⁰¹

³⁹⁷ See Arts. 12 and 28 Reg. 1/2003 and paras. 26-28 of the ECN co-operation Notice.

³⁹⁸ *Ibid*, para. 38.

³⁹⁹ See further Gauer and Jaspers, “The European Competition Network: A achievements and Challenges – A Case in Point: Leniency”, (2006-1) *EC Competition Policy Newsletter* 8, pp. 9-10.

⁴⁰⁰ *Ibid*, paras. 40-41. See also Gauer and Jaspers, *supra* (2006), p. 10.

⁴⁰¹ *Ibid*, para. 72 and Annex.

c. The New Institutional Position of Civil Courts

aa. The Powers of National Courts under the New System

Decentralisation of EC competition law enforcement will have a highly dramatic impact on the application of that law by civil courts, and on private antitrust enforcement, which is expected to grow from a rather meagre to a more complete and mature system.⁴⁰² National courts will no longer play a marginal role, but will soon become “full players” in the enforcement of the competition rules,⁴⁰³ albeit at a level complementary to that of public antitrust authorities, most notably the Commission. Indeed, the Commission considered private antitrust enforcement, as part of effective decentralisation, to be one of the three main objectives of the modernisation reforms.⁴⁰⁴

The direct effect of Article 81(3) EC will have a certain impact on civil litigation before national courts as, at least in theory, the Commission exemption monopoly was undoubtedly

⁴⁰² See various authors in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).

⁴⁰³ See Whish and Sufrin, *supra* (2000), pp. 151-152; Gerber, “Modernising European Competition Law: A Developmental Perspective”, 22 ECLR 122 (2001), p. 123; Favre, “Les défis de la mise en œuvre: Une compétence élargie pour les juges”, (2001-7/8) Rev.Conc.Consomm. 21, p. 22; Venit, *supra* (2001), p. 461; Burrichter, “Panel Three Discussion: Courts and Judges”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 479; Van Gerven, “Harmonisation Within and Beyond”, in: Van Empel (Ed.), “From Paris to Nice”, *Fifty Years of Legal Integration in Europe, International Pallas Conference, Nijmegen, May 24, 2002* (The Hague/London/New York, 2003), p. 12; Lowe, “Meeting the Challenge of Modernisation”, Speech Made at the Oxford Competition Policy Conference, July 15th and 16th 2003, in: <http://europa.eu.int/comm/competition/speeches>, p. 6; Lenaerts and Gerard, “Decentralisation of EC Competition Law Enforcement: Judges in the Frontline”, 27 *World Competition* 313 (2004), p. 314. See also Van Fleet, Imus, Johnston and Hennessee, “Private Antitrust Actions”, in: *The PLC Global Counsel Competition Handbook 2002/3* (London, 2002), p. 77, speaking of a shift to a litigation-based system. See also Venit, *supra* (2001), p. 464, stressing the more practical advantages of private enforcement in the new decentralised system of enforcement. That author stresses, in particular, the fact that civil proceedings will be swifter than national public proceedings because of the condensation of the application of the law into one proceeding. Then the judicial impartiality and the frequent access to expert testimony will improve the quality of enforcement and the role of the bar and of consultants will be far more developed and visible.

⁴⁰⁴ See e.g. Schaub and Dohms, *supra* (1999), p. 1060; former Commissioner Monti, “Modernisation of EU Competition Rules”, Speech Made at the Launch of the Competition Act 1998, London, March 2nd 2000, in: http://europa.eu.int/comm/competition/speeches/index_2000.html, p. 4. The objectives of the modernisation initiative were, firstly, to refocus the Commission’s activity on combating the most serious restrictions of competition, by ending the system of notification and authorisation while ensuring intensified *ex post* control; secondly, the decentralised application of the competition rules, while maintaining consistency throughout the Community; and, thirdly, easing the administrative constraints on undertakings, while providing them with sufficient legal certainty (paras. 41, 42, 74 and 75 of the White Paper). See Ehlermann, *supra* (2000a), p. 560, who criticises this multiplicity of objectives, when the sole objective should have been the increased efficiency of EC antitrust policy. According to the former Director General, decentralisation is a tool, not an objective. It is true that on occasions, the Commission proposes the enhancement of private enforcement not as a direct objective of the reform, but rather as a “result” thereof (see e.g. former Commissioner Monti, “Guest Editorial: A European Competition Policy for Today and Tomorrow”, 23(2) *World Competition* 1 (2000), p. 2).

an obstacle to increased private enforcement.⁴⁰⁵ With regard to timing in particular, the abolition of the Commission's monopoly will on balance be positive for national litigation, since the courts will be able to address the full range of competition law for the first time.⁴⁰⁶ In other words, they will no longer be obliged to suspend their proceedings until the Commission has decided on the applicability of Article 81(3) EC, thus "leaving the agreement suspended in a twilight zone between validity and nullity".⁴⁰⁷ On many occasions and, most notably, in the White Paper the Commission had admitted that the old system of enforcement was hardly encouraging for the development of private enforcement. In its words,

"since national competition authorities and courts have no power to apply Article 81(3), companies have used this centralised authorisation system ... to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted".⁴⁰⁸

The new role of national courts makes better economic sense, since the whole analysis under Article 81 EC will now take place in one forum, but, more importantly, creates a real culture of diffuse competition law enforcement and, as one commentator rightly observes,

⁴⁰⁵ This conviction is widely shared. See e.g. Department of Trade and Industry, *op.cit.*, para. 9.5. See also Slot, "Panel Discussion: EC Competition System: Proposals for Reform", in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), p. 228; Paulweber and Kögel, *supra* (1999), p. 503; Montag and Rosenfeld, "A Solution to the Problems? Regulation 1/2003 and the Modernisation of Competition Procedure", 1 ZWeR 107 (2003), p. 132; Hirsch, *supra* (2003), p. 237. On the measures that are proposed to be introduced in order to further develop private antitrust enforcement see *infra*.

⁴⁰⁶ Jones, *supra* (2003), p. 96. See also Wißmann, *supra* (2000), p. 132.

⁴⁰⁷ Venit, *supra* (2003), p. 554. Note, however, that the direct effect of Art. 81(3) EC will also mean that in those cases where under the previous system a restrictive agreement had not been notified to the Commission and thus the national civil courts had no other option but to declare it void (see *supra*), under the new system, voidness will not be an automatic consequence, but the courts will have to examine themselves the applicability of Art. 81(3) EC. According to the Commission, this will improve the "civil enforceability of agreements" (see e.g. former Commissioner Monti, *supra* (2003a), p. 9). There seems to be some confusion of identity as between the improvement of the civil enforceability of agreements and the enhancement of private enforcement. The two objectives, however, are contradictory. Indeed, one could argue that the automatic voidness of non-notified agreements under the previous system was more beneficial for private enforcement, if the latter is seen in its active form of persecution of anti-competitive agreements through civil claims.

⁴⁰⁸ Para. 6 of the White Paper. See also Van Miert, "European Competition Policy: A Retrospective and Prospects for the Future", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 10. See, however, Riley, "EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part One: Regulation I and the Notification Burden", 24 ECLR 604 (2003), p. 612, who doubts the significance of the Commission's "blocking effect" arguments.

consolidates the interpretation of the third paragraph of Article 81 EC as a “true rule of law” and not as a “discretionary political tool”.⁴⁰⁹

Regulation 1/2003 places national courts on an equal footing with the public enforcers for the first time. The competence of the courts to apply the antitrust provisions of the Treaty is solemnly recognised by Articles 1 and 6 of the new Regulation. Article 1, which introduces the legal exception system, reads as follows:

“1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) shall be prohibited, no prior decision to that effect being required. 2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) shall not be prohibited, no prior decision to that effect being required. 3. The abuse of a dominant position referred to in Article 82 shall be prohibited, no prior decision to that effect being required.”

Article 6 provides that: “national courts shall have the power to apply Articles 81 and 82 of the Treaty.” It should be mentioned at this point that the equivalent provision of the initial Regulation proposal was less appropriate and its style echoed the *ancien régime*: “national courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3).” It seems that the text in the proposal aimed to prevent parties to restrictive agreements from seeking declaratory relief from national courts in the sense that the agreement in question was lawful under Article 81(3) EC, thus reintroducing the administrative authorisation system through the back door. The reference in the text to the need for the prohibition of Article 81(1) EC to be “invoked” before the court aimed to exclude such declaratory claims based on Article 81(3) EC.⁴¹⁰ However, that text was unfortunate because it did not treat Article 81 EC as a whole, but referred to a “jurisdiction to apply Article 81(3)”, which was reminiscent of the old system of authorisation.⁴¹¹

⁴⁰⁹ Wils, *supra* (2002), p. 246.

⁴¹⁰ See Wils, *supra* (2001), p. 354. The same issue is raised by Whish and Sufrin, *supra* (2000), p. 151, who stress that English courts can adjudicate only if there is a genuine *lis pendens inter partes*. Thus according to the authors, parties could not use civil proceedings as an alternative to the notification procedure; in other words, it would not be possible for them to seek declaratory judgments on the applicability or otherwise of Art. 81(3) EC.

⁴¹¹ See criticism by Komninos, “Arbitration and the Modernisation of European Competition Law Enforcement”, 24 *World Competition* 211 (2001), p. 220. That text in fact caused a lot of confusion. See e.g. Holmes, “The EC White Paper on Modernisation”, 23(4) *World Competition* 51 (2000), p. 57, who read the draft text of Art. 6 as giving the power to apply Art. 81(3) EC only to national courts through so-called “positive decisions”. Only the latter would, according to that author, be able to declare that an agreement satisfied the tests of that Article and that it “was exempted from the prohibition”. Thus, the author went on to say that only the national courts and not NCAs could apply Art. 81(3) EC through “positive decisions”. It is clear, however, that such a view is the product of confusion, since the concepts of negative clearance and exemption are obsolete in the new system of enforcement.

The answer to this concern is that the legal exception system does not certainly delegate the application of Article 81(3) EC, as such, to national courts. Indeed, the latter will apply Article 81 EC as a whole to past and present situations in a civil dispute before them, unlike the case of the old exemption decisions that had effects also for the future.⁴¹² Courts simply apply Article 81 EC as a whole to a dispute before them and declare *inter partes* the applicability or inapplicability of that provision to an agreement. To speak of a competence to apply Article 81(3) EC no longer makes sense.

The permissive language in the initial proposal also seemed to imply that national courts would still have the discretionary choice as to whether or not to apply Article 81(3) EC, thus sticking to their old practice to stay proceedings in order to refer the matter to the Commission or an NCA.⁴¹³ The final text of Article 6 of Regulation 1/2003 remedies these points by adopting more correct language which treats Article 81 EC as a whole and abandons the old philosophy of the split between the first and third paragraphs of that provision.⁴¹⁴ Moreover, by also referring to Article 82 EC, it makes the point of its declaratory nature clearer. In other words, as Article 1 already introduces the legal exception system, Article 6 does no more than state the obvious, which is that Article 81 EC as a whole will be directly effective before national courts. The direct effect of Articles 81 and 82 EC is a direct consequence of the Treaty itself;⁴¹⁵ Article 6 of Regulation 1/2003 therefore does not change the legal reality, but merely clarifies it.⁴¹⁶ For the same reason, we must criticise the confusing references in the Notice on co-operation between the Commission and national courts to an “empowerment” of national courts to apply EC competition law through

⁴¹² See in this regard Paulis, *supra* (2001a), p. 409. This explains why the related discussion on the temporal effects of national courts’ judgments applying Art. 81(3) EC and on the possibility for the courts to accept commitments is misplaced. Some commentators had addressed the question whether national courts could determine the duration of “exemptions” under the new system and whether they could induce the parties to reach settlements, for example by offering and accepting commitments. See e.g. the conflicting approaches by Burrichter, *supra* (2001), pp. 542-543; Gröning, *supra* (2001a), p. 590; Schurmans, *supra* (2004), p. 94. On the possibility of such settlements “brokered” by national courts between the litigants see also Montag and Rosenfeld, *supra* (2002), p. 133.

⁴¹³ See in this sense the critical comments by Vogelaar, *supra* (2002), p. 23.

⁴¹⁴ The text of Recital 4 of the new Regulation appears clearer, speaking of “a directly applicable exception system”.

⁴¹⁵ For this reason we find curious the intention of the UK Department of Trade and Industry to “designate ‘national courts’” for the purposes of Reg. 1/2003. See Department of Trade and Industry, *op.cit.*, para. 9.11. This reference is probably the product of confusion, since the only duty of Member States is to designate NCAs (Art. 35 Reg. 1/2003) and certainly not courts, which have in any case the power and the duty to apply the directly effective competition provisions of the Treaty.

⁴¹⁶ See on this point Komninou, *supra* (2001), p. 220; Scuffi, *supra* (2004), p. 123. Of course, the opponents of the reform use the text of Art. 6 Reg. 1/2003 to argue that the Council Regulation is illegal, because it has ascribed direct effect to a Treaty provision, whereas the direct effect of a Treaty provision depends only on that Treaty provision itself. See e.g. the criticism by Pace, *supra* (2004), pp. 185-186.

Regulation 1/2003.⁴¹⁷ In essence, with regard to Article 81 EC, the legal reality is changed only by Article 1 of Regulation 1/2003 with the introduction of the legal exception.

The only remnant of the old exemption monopoly system that has survived the introduction of the new system, is the exclusive power to withdraw the benefit of a block exemption regulation which is enjoyed by the Commission and by Member States' competition authorities for their respective national territories. This is the sole instance where national courts are not on a equal footing competence-wise with the Commission and NCAs. Some commentators have relied upon this exclusive administrative competence to argue that even under the new system of legal exception national courts, when faced with situations in which the benefit of the block exemption should be removed, should still stay their proceedings, until the Commission or a national competition authority adopts a formal Decision to that extent.⁴¹⁸

However, under the new system of enforcement, national courts are no longer deprived of full competence to decide a case based on the whole of Article 81 EC and on the block exemption regulation. In that sense, the exclusive power of the competition authorities to withdraw the benefit of a block exemption does not interfere with the courts' competences, and the latter are no longer required to stay proceedings. They will apply the block exemption regulation if the latter is applicable, irrespective of the existence of factors that might justify the withdrawal of the exemption benefit with *erga omnes* effect by a public authority.

Although the benefit of the block exemption may be withdrawn in an individual case if the conditions of Article 81(3) EC are not fulfilled, Member States' courts have no power in that respect, since withdrawal can only take place through a constitutive decision by a public authority (the Commission or NCAs). The courts only have the power to decide whether or not the agreement is covered by the block exemption regulation.⁴¹⁹ They need only prove that the agreement is block-exempted. According to the Commission, "the application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements falling within their scope fulfil each of the four conditions laid down in Article 81(3)".⁴²⁰ In other words, in the context of private

⁴¹⁷ Para. 6 of the co-operation Notice.

⁴¹⁸ See Ritter, Braun and Rawlinson, *supra* (2003), p. 81.

⁴¹⁹ See already Bechtold, *supra* (2001), p. 54, who presciently refers to this new function of block exemption regulations to free parties of their burden of proving the fulfillment of the Art. 81(3) EC conditions.

⁴²⁰ Para. 35 of the Notice on Art. 81(3). See, however, Recital 12 of the new block exemption Regulation 772/2004 on technology transfer agreements which states: "There can be no presumption that above [the] market-share thresholds technology transfer agreements do fall within the scope of Article 81(1) ... There can also be no presumption that above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(1) will not satisfy the conditions for exemption..." There seems to be a divergence

enforcement, the fact that an agreement falls under a block exemption functions as a non-rebuttable presumption that it is legal under Article 81(3) EC, at least while the block exemption benefit has not been withdrawn in the context of public enforcement.⁴²¹

It would therefore not be in accordance with the spirit of the new parallel competencies system for the court to stay proceedings at this stage *a fortiori* because the public authority involved retains full discretion as to whether or not to withdraw the benefit of the block exemption.⁴²² This case is different from the old individual exemption decisions to which notifying parties were entitled, especially in view of pending stayed national proceedings.

Of course, in appropriate cases a court may consider staying proceedings if the Commission has *already* started proceedings, *ex officio* or following a complaint (possibly by one of the litigants), with a view to withdrawing the benefit of a block exemption from the agreement at issue. This faculty of the court, however, would no longer be connected with its incapacity to apply the competition provisions in their entirety and to render judgment, but would rather be motivated by its duty to avoid giving a decision which might conflict with a decision contemplated by the Commission⁴²³ in proceedings it had initiated, as stressed by Article 16(1) of Regulation 1/2003.

between the use of the term "presumption" in the Notice on Art. 81(3) and in the technology transfer block exemption Regulation. We submit that the kind of presumption to which the Notice on Art. 81(3) refers is a non-rebuttable one in the context of a civil litigation, whereas the kind of presumption, to which Reg. 772/2004 refers, is always rebuttable.

⁴²¹ See also para. 51 of the Commission Notice on the handling of complaints: "Agreements that fulfil the conditions of a block exemption Regulation are *deemed* to satisfy the conditions of Article 81(3)" (emphasis added).

⁴²² See in this regard para. 2 of the Commission Notice on Art. 81(3) EC, which addresses this issue and stresses that competition-restrictive agreements within the meaning of Art. 81(1) EC will be legally valid and enforceable if covered by a block exemption regulation. Such agreements could "only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority".

⁴²³ But not decisions contemplated by NCAs. Community law does not deal with such cases of possible conflicts between decisions by national courts and NCAs, which can only be resolved according to national law. Formidable problems would arise, if an NCA initiated proceedings and contemplated withdrawing the benefit of a block exemption regulation in its distinct geographic market, but the parallel civil litigation took place in a different jurisdiction (possibly pursuant to a choice-of-forum clause). In such cases it should be appropriate for the Commission to open proceedings pursuant to Art. 11(6) Reg. 1/2003, unless the distinct geographical market to which the NCA's decision relates, presents special characteristics that justify the separate treatment. See for example Jenny, "On the Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 364-365, who considers more important consistency of reasoning rather than consistency of decisions. That author does not exclude the possibility that one and the same agreement might generate different responses in different Member States, because of differing conditions of competition in these markets. This is more likely to happen with vertical rather than with horizontal agreements. See, however, *contra* Cooke, "Commission White Paper on Decentralisation of Competition Rules: The Threat to Consistency", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 554, who identifies in these conflicts a problem for the single market function of the competition rules.

Finally, a new role to be played by national courts under the new system established by Regulation 1/2003 is the enforcement of commitments contained in binding Commission decisions and addressed to specific parties. Article 9 of Regulation 1/2003 introduces for the first time the possibility for the Commission and for national competition authorities - though not for courts - to accept commitments offered by undertakings and to make them binding upon the latter. That will happen when the Commission or the national competition authority intends to adopt a prohibition decision, but refrains from doing so, as a result of the commitments offered, if the commitments meet the concerns of the authority in question, as expressed in its "preliminary assessment", which in the EC competition law enforcement context equals to a statement of objections.⁴²⁴ Commitments offered by the undertakings, if accepted by the Commission, may be integrated by the latter in a formal decision, which simply finds that there are no longer grounds for action by the Commission, without concluding that there has been or still is an infringement of the Treaty competition rules.⁴²⁵ In that sense, such Commission decisions are neither applicability nor inapplicability decisions and equally should not be confused with the negative clearance decisions of the old system.⁴²⁶ Undertakings not in compliance with commitments declared binding upon them by Commission decision, face fines up to 10% of their total worldwide turnover in the preceding business year and periodic penalty payments up to 5% of their average daily turnover.⁴²⁷ In addition, in case of breach of commitments the Commission may reopen proceedings.⁴²⁸ Notwithstanding these powerful administrative mechanisms to enforce commitment decisions, an interesting question is whether national courts can also enforce commitments

⁴²⁴ Note that Art. 9 Reg. 1/2003 does not allow for the Commission to formally accept commitments and to make them binding upon the undertakings concerned, when the commitments are given in order for the former to reduce a fine for an infringement of the competition rules. According to Recital 13 Reg. 1/2003 commitment decisions are not appropriate in cases where the Commission intends to impose a fine. See to that extent the Commission's public communication entitled *Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour)*, *Frequently Asked Questions and Answers*, MEMO/04/217, 17 September 2004, in: <http://europa.eu.int/comm/competition>. Such commitments have been informally accepted in the past in Commission Decision 85/202/EEC of 19 December 1984 (*Wood pulp*), OJ [1985] L 85/1. It seems, however, that, outside the context of Reg. 1/2003 and in an informal manner, the Commission can still use this possibility.

⁴²⁵ Recital 13 Reg. 1/2003.

⁴²⁶ Since such Commission decisions will leave open the question whether there was an infringement of Arts. 81 or 82 EC, and since they will incorporate commitments that were given by the parties themselves, they cannot be challengeable before the CFI by their addressees. See further Celli, "Modernisation of Competition Rules in the EU: What Will Change in Practice?", Paper Presented at the Sixth Annual IBA Competition Conference (Fiesole, 20 September 2002), p. 10. Compare, however, Paulis and Gauer, *supra* (2003), p. 68, according to whom the undertakings concerned can still seize the CFI in case of infringement of essential procedural requirements and of misuse of powers. Of course, complainants can still challenge commitment decisions before the CFI.

⁴²⁷ Arts. 23(2)(c) and 24(1)(c) Reg. 1/2003.

⁴²⁸ Art. 9(2)(b) Reg. 1/2003.

contained in a Commission decision as against the addressee of that decision and whether third parties can rely on the decision to enforce rights derived therefrom. While the Commission is clearly keen to engage the courts in the monitoring, application and enforcement of such commitment decisions,⁴²⁹ doubts have been expressed as to whether these decisions enjoy horizontal direct effect and can confer rights on third parties.⁴³⁰

The answer to this question must be that, indeed, national courts will have the competence to apply and enforce commitment decisions to the extent that such decisions are sufficiently clear, precise and unconditional as to the obligations they impose on their addressees⁴³¹ and confer rights on third parties to invoke these obligations.⁴³² Since the addressees of these decisions are individuals, the decisions will naturally have *horizontal* direct effect, exactly like Articles 81 and 82 EC.⁴³³

bb. Co-operation Mechanisms between the Commission and National Courts

Regulation 1/2003 does not stop at making national courts competent to apply the Treaty antitrust rules in full; it also creates an institutional framework, with prudential mechanisms which aim at meeting concerns regarding the consistency of decentralised enforcement of EC competition law. The Chapter IV provisions under the title “Co-operation with national authorities and courts” are permeated by a general spirit of co-operation. That spirit is further

⁴²⁹ Compare the Commission’s public communication on commitment decisions, *op.cit.*, which states that “national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures”. See also Paulis and Gauer, *supra* (2003), p. 68.

⁴³⁰ See further Montag and Cameron, “Effective Enforcement: The Practitioner’s View of Recent Experiences under Regulation 1/2003”, Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005), p. 12; Davies and Das, “Private Enforcement of Commission Commitment Decisions: A Steep Climb, not a Gentle Stroll”, in: Hawk (Ed.), *International Antitrust Law and Policy 2005, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2006), p. 202 *et seq.*

⁴³¹ See Case 9/70, *Franz Grad v. Finanzamt Traunstein*, [1970] ECR 825, para. 9.

⁴³² Compare *Grad*, *op.cit.*, para. 5: “It would be incompatible with the binding effect attributed to decisions by Article 189 [now 249] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*l’effet utile*) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law”. Note that there is a debate in the academic and judicial circles in Europe as to the nature of direct effect, in particular as to whether the conferral of rights to individuals is a constitutive element of direct effect or whether it merely follows from their sufficiently clear, precise and unconditional status. See further Edward, “Direct Effect - Myth, Mess or Mystery?”, 7 *Dir.Un.Eur.* 215 (2002).

⁴³³ Compare the position under UK law. S. 94 of the Enterprise Act 2002 expressly states that commitments (“enforcement undertakings”) produce rights owed to any person who may be affected by a contravention of the commitments and any breach of the duty to comply with such commitments which causes such a person to sustain loss or damage shall be actionable by him.

elaborated and given effect by the accompanying Notice on co-operation between the Commission and national courts.

We should stress, however, that while national competition authorities make part of a network of public enforcers, national courts are placed in an institutionally different context.⁴³⁴ Indeed, the latter cannot formally make part of such a network. They cannot formally belong to such a network, because of their independence of the executive branch. In fact the Commission's approach to the proposed system of co-operation with national courts is entirely different from its approach to co-operation with NCAs, in language, style, and substance. National courts, being both independent and also *juges communautaires de droit commun*, are accorded much greater deference, because of their independence of the executive branch.⁴³⁵ They are subject only to the European Court of Justice, which is effectively the Supreme Court of the European Union and its Member States on matters of Community law.⁴³⁶

Notwithstanding this stance of deference, one cannot fail to note the difference of philosophy between US antitrust and EC competition law. Although the enforcement agencies in the US do file occasionally *amicus curiae* briefs in pending cases before the courts, "assistance" from or "co-operation" with the Antitrust Division of the Department of Justice or the Federal Trade Commission in the EU sense, has never been an issue for US courts applying the antitrust laws.⁴³⁷ On the contrary, in the EU, this has been a persevering concern. The reasons of this diversity lie in the profound development of the US system of private antitrust enforcement and in its long emancipation from the public enforcement model. They are also to be explained historically, because in the EU the previous prior authorisation system and the centralised enforcement at the level of the Commission made natural such dependence of civil courts on the Commission and public authorities.

There are two ways to view the co-operation mechanisms between the Commission and national courts. One way is to explain them by reference to the long-held conviction in

⁴³⁴ On European networks of national courts mainly in the justice and home affairs area see Canivet, *supra* (2004), p. 48 *et seq.*

⁴³⁵ See above on the question whether the principle of separation of powers applies as between the Community and the national level.

⁴³⁶ In that sense, one can, indeed, speak of a "network" of Community courts, i.e. a network comprising the Court of Justice and national courts in their capacity as Community courts of general jurisdiction (*juges communautaires de droit commun*). The functioning of this network is based on the principle of co-operation, enshrined in Art. 234 EC. See further Anagnostopoulou-Yiannakou, *supra* (2004), p. 80.

⁴³⁷ See e.g. Vance, *supra* (2001), p. 638, stressing that for US judges it appears distasteful for a court to interrupt its proceedings in order to ask a public authority for an answer to complex economic questions. See also McCurdy, "The Impact of Modernisation of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective", 25 ECLR 509 (2004), p. 511.



Europe that by definition public enforcement is superior to private enforcement, simply because a specialised public authority is better acquainted with the economic specificities of antitrust law than generalist judges.⁴³⁸ However, apart from the fact that such a paternalistic view does not do justice to the courts, it results in subjugating private to public enforcement and is certainly incompatible with the independent status of the former, as we have explained above.⁴³⁹ Therefore, in our view, the provisions of Article 15 of Regulation 1/2003 owe their existence to the more “mundane” sensitivities that are developed in the Community-national law fine balance, and not to a precedence of public over private enforcement. In other words, these co-operation mechanisms were intended in order to assuage the concerns of the opponents of modernisation and decentralisation, who cautioned against inconsistency and incoherence of antitrust enforcement as between the Community (i.e. the Commission) and the national level (*in casu* the courts).⁴⁴⁰ As we have explained above, giving a certain degree of precedence to the *Community* over the *national* level is different from doing the same to *public* over *private* enforcement.⁴⁴¹ The fact that civil antitrust litigation has an impact not only on the private interests of the parties but also on the general public interest⁴⁴² certainly is an additional factor that further explains the co-operation mechanisms of Article 15 of

⁴³⁸ Compare the view held by Capelli, *supra* (2000), p. 567, who addresses this question with reference to the old co-operation Notice and to the “advice” given by the Court of Justice in *Delimitis* to national courts towards co-operation rather than confrontation with the Commission. According to this commentator those principles make evident the marginal role of national courts and of the predominant position of the Commission under the old system of enforcement. See also Jones and Sharpston, *supra* (1996-97), p. 108; Meli, *supra* (2002), p. 129. These authors criticise the 1993 Notice as indicative of a paternalistic attitude of the Commission towards national courts. According to these authors the Commission should have instead genuinely encouraged private antitrust enforcement, by not furthering the dependence of the national courts on itself, but by establishing the principle that national courts have enough authority to decide cases before them.

⁴³⁹ Compare the paternalistic approach of former Commissioner Monti with reference to the co-operation mechanisms between the Commission and national courts, *supra* (2003b), p. 5: “These means of interactions are intended to allow the Commission ... to draw courts’ attention to important issues relating to the application of EU antitrust rules and *contribute to the coherence of their rulings*” (emphasis added).

⁴⁴⁰ Of course, one may still wonder why competition law is singled out for special treatment. See in that regard Bourgeois and Humpe, “The Commission’s Draft ‘New Regulation 17’”, 23 ECLR 43 (2002), p. 46. As the authors rightly point out, national courts are involved in interpreting and applying general EC law, subject to the Art. 234 EC preliminary reference procedure which apparently has proven to be sufficient. A response to the authors’ question can be that the intervention mechanisms of the Commission before national proceedings are as exceptional, as indeed exceptional had been the initial centralisation of competition law enforcement. The gradual decentralisation explains historically the putting in place of these particular mechanisms of co-ordination between the Commission and national courts.

⁴⁴¹ With specific regard to Art. 15(3) Reg. 1/2003, the fact that the text of the Regulation gives the power to submit observations not only to the Commission but also - indeed primarily - to NCAs (see *infra*), does not affect our analysis, since Reg. 1/2003 sees the latter as agents for the Commission and, in any event, as indirect Community administration when they apply *Community* competition law.

⁴⁴² See above on the “private attorney-general” role of private enforcement and on the goals of public and private antitrust enforcement.

Regulation 1/2003 and, indeed, other existing mechanisms in national competition laws, but this by no means indicates any precedence of public over private enforcement.⁴⁴³

The co-operation mechanisms provided for in Regulation 1/2003 and expounded in the co-operation Notice and are uniformly available to all national courts around the EU. This is to be welcomed, since they are no longer dependent on national procedural laws or practices. Furthermore, contrary to some authors' view that the dialogue between the Commission and the national courts must be expressly accommodated by national procedural laws which will have to be amended "to make it practically possible to enforce Chapters IV and V of the new Regulation",⁴⁴⁴ Regulation 1/2003 is directly effective and does not need any implementing measures in the national legal orders.⁴⁴⁵

It is rather disappointing, however, that the Commission does not offer any clarity on this point. The co-operation Notice in paragraph 9 refers to Community law determining "the conditions in which EC competition rules are enforced" and stresses the following:

"Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations. These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules, which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly

⁴⁴³ Compare, with regard to the situation in the UK, Peretz, *supra* (2001-02), p. 10: "In general, the courts regard themselves as being able to resolve issues of law (even issues with a significant public policy element) without the assistance of the executive".

⁴⁴⁴ See e.g. Keserauskas, "Practical Implications of the EC Antitrust Enforcement Revolution", in: <http://www.lpyl.lt/en/docs/download/341.php>, p. 10. This question arises also with regard to the *amicus curiae* intervention of the Commission and NCAs before national courts. For the view that implementing measures are necessary see Wezenbeek-Geuke, "Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, Particularly when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from the Netherlands", LIDC Questions 2001/2002, in: <http://www.ligue.org>, p. 14; Idot, "L'entrée en vigueur du règlement n° 1/2003 : Les dispositions procédurales du 'paquet modernisation'", (2004-5) *Europe* 4, p. 5.

⁴⁴⁵ See e.g. Scuffi, *supra* (2004), p. 127; Hirsch, *supra* (2003), p. 241. According to Lenaerts and Gerard, *supra* (2004), p. 334, while no further implementing measures are necessary because of the direct effect of Reg. 1/2003, the principle of legal certainty may, however, require the Member States to adapt their internal law to ensure the effective implementation of the Community legislation. This is in line with the ECJ case law. See e.g. case 230/78, *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v. Minister of Agriculture and Forestry et al.*, [1979] ECR 2749, para. 34. A similar approach has been followed by Belgian law. The *Arrêté Royal* of 25 April 2004, *Moniteur belge*, 3-5-2004, pp. 36537-36543, which adapted Belgian competition law to Reg. 1/2003, expressly states: "Even if Regulation 1/2003 is directly applicable and has supremacy over incompatible national rules, European law obliges, nevertheless, the Member States to formally adapt, in the interest of legal certainty, all incompatible rules. This necessitates a number of adaptations in the Act on the protection of economic competition".

applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force.”

However, paragraph 17 of the Notice qualifies all this by stating that “Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities [Regulation 1/2003] offers”.

A final note should be added with regard to horizontal (or maybe diagonal) forms of co-operation.⁴⁴⁶ While the new Regulation and the accompanying co-operation Notice essentially deal with “vertical” co-operation as between the Commission and national courts, there are cases where a more “horizontal” or “diagonal” form of co-operation as between national courts of one Member State and national competition authorities of another Member State may, indeed, be necessary.⁴⁴⁷ It is true that such forms of horizontal co-operation are not totally unknown to Community law,⁴⁴⁸ but this matter was probably considered too sensitive even for a soft law instrument to refer to. While it is difficult to speak of Community law duties between Member States judicial and administrative organs, it can be argued that such a co-operation may well be in line with the spirit of the EC Treaty as well as with numerous specific provisions which refer to “solidarity” and “co-operation” among Member States.⁴⁴⁹ In all likelihood, in cases necessitating this form of co-operation, a national court could seize the Commission and request the latter’s assistance in getting in touch with another Member State’s competition authority.⁴⁵⁰

⁴⁴⁶ This matter is different from the question of the binding or non-binding nature of the decision of a Member State’s court or NCA over the courts/NCAs of other Member States. This question is dealt with below.

⁴⁴⁷ See e.g. the comments submitted by the American Bar Association on the Commission’s Modernisation package, available in: http://ec.europa.eu/comm/competition/antitrust/legislation/procedural_rules/comments.

⁴⁴⁸ Compare Art. 135 EC speaking of Community measures “in order to strengthen customs cooperation between Member States” and Art. 280(3) EC with reference to co-operation among Member States’ authorities aimed at protecting the financial interests of the Community against fraud. See also *European Parliament and Council Regulation 2006/2004 of 27 October 2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws (the Regulation on Consumer Protection Cooperation)*, OJ [2004] L 364/1; *European Parliament and Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”)*, OJ [2000] L 178/1, Art. 19.

⁴⁴⁹ See e.g. Art. 2 EC *in fine*. Art. 61 EC could provide for an additional legal basis for Community legislation in this area. On the principle of solidarity among Member States in the framework of the European Constitution see Callies, *supra* (2004), p. 1039.

⁴⁵⁰ One cannot exclude also the relevance of *Council Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters*, OJ [2001] L 174/1. While, on the one hand, it is clear that the Regulation does not apply to administrative authorities, on the other hand, specialist tribunals or “competition” or “market” courts seem to be covered. Such courts may, indeed, have been designated under Article 35 Reg. 1/2003 as “the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty”, therefore they are bound to co-operate for evidence purposes with other Member States’ courts.

cc. The Right of National Courts to Seek the Commission's Assistance

The possibility of national courts dealing with EC antitrust issues to seek the Commission's assistance is the first important mechanism of co-operation. This was at the courts' disposal already under the previous system of enforcement but now is "codified" and strengthened by Regulation 1/2003 and the accompanying co-operation Notice. The European Court of Justice has long stressed on numerous occasions the duty of the Commission to assist the national courts in this respect, a duty that emanates from Article 10 EC.⁴⁵¹ To that end, the 1993 co-operation Notice contained detailed provisions on this mechanism, but national courts did not make considerable use of the procedures enshrined therein.⁴⁵² This may have been due to national procedural obstacles to such cooperation with the Commission, or to the courts' general reluctance to take that course because of the perceived limited scope of the information the Commission could give them under the Notice;⁴⁵³ or, perhaps most likely, to the belief of national judges that if the national litigation had to be delayed in order to consult an "outside" body, it was better to consult the Court of Justice on the question, rather than the Commission. From the side of practitioners it has also been stressed that, while the Commission in the early years seemed more prepared to intervene in order to guide national

⁴⁵¹ In case C-2/88, *Criminal Proceedings against J.J. Zwartveld et al.*, [1990] ECR I-3365, paras. 17-18, the ECJ stressed that the principle of sincere co-operation in Art. 10 EC is not one-sided, namely it does not impose duties only on Member States but covers also Community institutions. These have a duty to co-operate with Member States' authorities, in particular judicial authorities, which are responsible for ensuring that Community law be applied and respected in the national legal system. As far as EC competition law enforcement is concerned, in *Delimitis v. Henninger Bräu*, *op.cit.*, para. 53, the Court reiterated this duty of co-operation on the part of the Commission by stating that national courts may address the former and seek economic and legal information.

⁴⁵² See Riley, "EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1", 24 ECLR 657 (2003), p. 665-666. Up to 1998, national courts had seized the Commission in fifteen cases. Such applications for assistance came from Belgium (three cases - one of this cases is reported by Stuyck, *supra* (1995), pp. 48-49), France (three cases), Germany (three cases), the Netherlands (one case), Spain (three cases), the UK (one case), and, interestingly, from one arbitral tribunal having its seat in Spain (see below). The time the Commission took to respond varied from some months in most cases, to two years in one case. See further Joris, "Communication relative à la coopération entre la Commission et les juridictions nationales pour l'application des articles 85 et 86 : Cas d'application jusqu'à présent", (1998-4) *EC Competition Policy Newsletter* 47, pp. 47-48. In 1999 national courts used only in five cases the 1993 co-operation Notice in order to seek the assistance of the Commission (*Commission XXIXth Report on Competition Policy - 1999*, *op.cit.*, pp. 17 and 363 *et seq.*). In 2000 national courts seized the Commission in seven cases (see *Commission XXXth Report on Competition Policy - 2000* (Brussels, 2001), p. 338 *et seq.*).

⁴⁵³ See the criticism of the Notice in this regard by Brinker, "Rapport allemand", in: *XVIII congrès FIDE* (Stockholm, 3-6 juin 1998), Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 20. Other authors explain the rarity of contacts between national courts and the Commission by reference to the traditional reluctance of the former to engage in a dialogue with a non-judicial administrative authority. See e.g. Temple Lang, *supra* (1999), p. 288.

courts, recently it was hesitant to give an opinion to a national court, unless specifically solicited by the court.⁴⁵⁴

The express provision of Article 15(1) of the new Regulation resolves these problems by establishing a right for national courts to obtain legal or economic information from the Commission or request its opinion on questions relating to the application of the competition rules.⁴⁵⁵ The new Cooperation Notice develops the details of this procedure further, and also provides for deadlines by which the Commission must reply.⁴⁵⁶

The specific language of Article 15(1) which refers to courts *asking* the Commission to transmit to them information or its opinion has led some commentators to doubt whether this establishes a *right* for national courts and a *duty* for the Commission to co-operate.⁴⁵⁷ This line of criticism, however, seems unjustified, because Article 15(1) of Regulation 1/2003 does nothing more than specifying the more general rights and duties flowing from Article 10 EC. Taking also into account the Community Courts' precedents, there is no doubt that indeed national courts have the right to actually co-operate with the Commission and to receive the requested information and/or opinion, subject to the limitations of the Treaty, Regulation 1/2003 and the co-operation Notice.

There are two kinds of assistance a national court may request from the Commission. It may ask for documents in the Commission's possession, or for information of a procedural nature, basically concerning the status of the proceedings before the Commission. The Notice promises that the Commission will respond to such requests within a month.⁴⁵⁸ Alternatively, the court may ask the Commission for its opinion on economic, factual and legal matters.⁴⁵⁹ The Commission will aim to respond within four months.⁴⁶⁰

The co-operation Notice appears to grant this second possibility only if other tools (the case law of the Community Courts and Commission regulations, decisions, notices and guidelines)

⁴⁵⁴ See Holley, "EEC Competition Practice: A Thirty-year Retrospective", in: Hawk (Ed.), *International Antitrust Law and Policy 1992, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1993), p. 724.

⁴⁵⁵ See also cases C-174/98 P and C-189/98 P, *The Netherlands and Gerard van der Wal v. Commission*, [2000] ECR I-1.

⁴⁵⁶ See paras. 21-30 of the Notice.

⁴⁵⁷ See e.g. Kirchner, *supra* (2002), p. 15.

⁴⁵⁸ Para. 22 of the Notice. The one month period may be excessive in cases of pure procedural information (for example on whether there is a pending proceeding before the Commission).

⁴⁵⁹ For an example of a case where the national court requested and received a written opinion from the European Commission see Cour d'appel de Bruxelles, 10-11-05, *Wallonie Expo (WEX) v. La Chambre Syndicale des constructeurs d'automobile et de motocycles de Belgique and Fédération belge des industries de l'automobile et du cycle réunies (FEBLAC)*, in: http://europa.eu.int/comm/competition/antitrust/national_courts.

⁴⁶⁰ Para. 28 of the Notice. Again, this may not be satisfactory especially in cases of urgency, such as in preliminary injunction proceedings.

“do not offer sufficient guidance”.⁴⁶¹ This limitation, however, which echoes a similar limitation in the Notice on guidance letters,⁴⁶² is not found in the Court of Justice’s case law on co-operation between national courts and the Commission. According to the principles emanating from Article 10 EC, the time and circumstances of a national court’s request for the Commission’s assistance should be entirely subject to the national court’s discretion, unless of course the court acts in an abusive manner that undermines the whole principle of co-operation. In any event, the above limitation appears to be really more a reminder to national courts to ensure the effectiveness of this mechanism by using it prudently, and not to overwhelm the Commission with requests for assistance.

Apart from the co-operation between the Commission and national courts, it should be noted that some national competition laws, already before modernisation, have provided for such a procedure, whereby national courts may address questions regarding the application of national competition laws to the national competition authority or to a specific national court, such as was, until recently, the case with the Brussels Court of Appeal in Belgium.⁴⁶³ Since national competition authorities and courts will under the new system apply fully the Treaty competition rules, the possibility for a national court to seize with such questions the respective national authority or court should extend also to EC competition law questions, to the extent that this has not yet been expressly introduced by national law.⁴⁶⁴

⁴⁶¹ Para. 27 of the Notice.

⁴⁶² Notice on Guidance Letters, para. 8, point (a).

⁴⁶³ Arts. 42 and 42bis of the old Belgian Competition Act. See on this point Maffei, “Judicial Review in Competition Cases”, in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD (Paris, 1997), pp. 128-129; Van Bael, “Belgium”, in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003), p. 58. For examples of this procedure see Cour d’appel de Bruxelles, 28-9-04, *Eddy Lodiso v. La SPRLU M.O.N.D.E.*, in: http://europa.eu.int/comm/competition/antitrust/national_courts; Cour d’appel de Bruxelles, 23-6-05, *Laurent Emond v. Brasserie Haacht*, in: http://europa.eu.int/comm/competition/antitrust/national_courts. This possibility does not deprive the ordinary judge of his power to send instead an Art. 234 EC preliminary reference to Luxembourg or to seize the Commission under Art. 15(1) Reg. 1/2003, if there are also Community law questions. It is interesting to note that in 2004 the Brussels Court of Appeal forwarded three such references to the Commission as requests for an opinion under Art. 15(1) Reg. 1/2003. The requests raised issues concerning the simultaneous application of Arts. 81 and 82 EC, the scope of Art. 82(c) EC, the vertical agreements block exemption Regulation and the accompanying Guidelines and the *de minimis* Notice. See *Commission XXIVth Report on Competition Policy – 2004* (Brussels/Luxembourg, 2005), para. 113. It is understood that this competence of the *Cour d’appel* has now been transferred to the Belgian *Cour de cassation*. See further De Bauw, Tallon, Dubois, Zonnekeyn, Diamant, Braun, Fierens, Smeets, Verdonck, Poncelet and Dessard, “La modernisation belge après la modernisation européenne du droit de la concurrence - Le nouveau projet de loi sur la protection de la concurrence économique n’apporte pas de véritable révolution : Une opportunité à pourtant saisir ?”, (2006) *Electronic-Revue de la Concurrence*, March Issue, in: <http://www.ligue.org>, pp. 27-29.

⁴⁶⁴ Thus, in France, national courts have been able to address questions regarding also the application of EC competition law to the *Conseil de la concurrence* (see now Art. L462-3 *Code de commerce*). For an example of a case where this procedure has recently been followed with regard to national competition law see *Conseil de la concurrence*, 9-11-05, Avis n° 05-A-20, concerning a preliminary reference by the Paris District Court in *Luk Lamellen v. Valeo*. In Germany, before the latest amendment of the Competition Act, this was possible pursuant to ss. 96 and 87 GWB in conjunction with s. 148 of the Code of Civil Procedure (ZPO). Reference is now made

While a national court will be seizing the Commission under Article 15(1) of Regulation 1/2003, it may decide to stay its proceedings. The staying of proceedings will take place according to national procedural rules. Some legal systems have encountered difficulties in accommodating easily this co-operation of national courts with the European Commission, because their procedural system does not formally allow for a process of contacts with a non-judicial authority.⁴⁶⁵ As a result, some Member States' courts have never seized the Commission with requests of information, while other courts have proceeded to such co-operation in a non-formalised manner.⁴⁶⁶ This particular problem was regrettable, because it created conditions of divergence in the full and effective decentralised application of the EC competition rules by national courts. This problem should no longer exist under the new system. While it is true that the 1993 co-operation Notice specified that the facility to stay proceedings and seize the Commission depends on the applicable national procedural rules,⁴⁶⁷

to s. 90a(3)(4) GWB. In Finland, see Art. 18a(4) of the Competition Act providing that during the judicial proceedings regarding an action for damages, courts may request a statement from the Finnish Competition Authority. In Spain, Art. 13(3) of the Competition Act (LDC) of 1989 (as subsequently amended), provides that civil courts may request the *Tribunal de defensa de la competencia* to issue an opinion on the appropriateness and amount of the damages to be paid in a case of antitrust violation. We understand that this procedure is retained in the recent Spanish Competition Bill. In the Netherlands, there have also been precedents where the civil courts requested an opinion from the Dutch Competition Authority in the context of preliminary relief proceedings, which are quite informal and could allow for such a mechanism: see President Rechtbank Amsterdam, 23-7-98, *Wij Special Media v. INU*, reported by Wezenbeek-Geuke, *supra* (2001-2002), p. 10. In Greece, the Competition Committee may address an opinion to some Ministries or even to chambers of commerce and to commercial and industrial unions, either *ex officio* or at their request (see detailed rules of Arts. 8e and 8f L. 703/1977, prior to the 2005 amendment). However, courts are not included in this list of addressees, although it is accepted that Art. 249 of the Greek Code of Civil Procedure could be relied upon to this aim. It is striking that the latest amendment of the Greek Competition Act has provided for a co-operation mechanism between Greek civil courts and the European Commission (as indeed Art. 15 Reg. 1/2003 requires) but has not extended this to cover the relationship with the Greek Competition Committee.

⁴⁶⁵ This is the case in Italy. See Tavassi, "Il regolamento CE N. 1/2003: Verso la devoluzione di competenze in materia di concorrenza dalla Commissione europea alle autorità garanti ed ai giudici nazionali", 43 *Dir.Com.* 315 (2004), pp. 335, 361-362. In Italian law, Art. 213 of the Code of Civil Procedure can be used for the request of factual information. With regard to legal matters, commentators have doubted whether Art. 295 can be used for obtaining the opinion of the Commission, because that provision refers to "another judge that must resolve a civil or administrative dispute, on which the decision in question depends". The Commission not being a judge and its decision not binding the civil court, that provision could not be used to the stated aim (see Lang, *supra* (1996), p. 257; Di Via, *supra* (1996), p. 92; Tavassi and Scuffi, *supra* (1998), pp. 50-52). It should be stressed that those authors' view as to the non-binding nature of Commission decisions precedes the judgment of the ECJ in *Masterfoods*, where the opposite was decided. However, the problem remains that the Commission is not a judge, in order for Art. 295 of the Italian Code of Civil Procedure to apply. Another possibility would be provided by Art. 14 *Legge* n. 218/1995, which allows courts to seize experts or other specialised institutions. This discussion has now, in any case, become obsolete, because Reg. 1/2003 expressly provides itself for this power of national courts (see Scuffi, *supra* (2004), p. 127).

⁴⁶⁶ Apart from Italian courts (see Tavassi, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 18; Scuffi, *supra* (2004), p. 127), this also seems to be the attitude of Austrian courts (see Günther, *supra* (2001), p. 353; Eilmansberger and Thyri, *supra* (2004), p. 52).

⁴⁶⁷ This had also been accepted by the ECJ. See *Dijkstra*, *op.cit.*, para. 36: "... the national court may, if it is appropriate and consistent with the national rules of procedure, obtain additional information from the Commission or allow the parties to seek a decision from the Commission" (emphasis added).

the new express provisions of Community secondary legislation supersede any national legislative or practical obstacle. This should also come as a result of Article 10 EC. Indeed, under the previous system of enforcement, it was proposed, as a way out of national procedural obstacles, to rely on pertinent domestic procedural rules read in conjunction with Article 10 of the Treaty, which obliges national courts to ensure the effective application of Community law.⁴⁶⁸

The decision whether to seize or not the Commission under the terms of Article 15(1) remains that of the national court.⁴⁶⁹ Any opinion or assistance given by the Commission under this mechanism does not bind national courts.⁴⁷⁰ Nevertheless, the co-operation procedure has raised concerns regarding due process, since the Commission's opinion will be transmitted without the parties being heard,⁴⁷¹ and a court might follow it slavishly without giving the parties an effective opportunity to contradict it. As the rules stand, the Commission will not be under an obligation to communicate its submissions to the parties or to base them on the evidence before the court.⁴⁷² This may contrast with the equivalent status of communications to national courts by NCAs. Thus in French law, any communication by the *Conseil de la concurrence* pursuant to a court request which concerns national or Community competition law questions presupposes that the parties are heard (*procédure contradictoire*), unless the information transmitted has its source in past proceedings before the *Conseil*.⁴⁷³

A final reservation based on Community, rather than on national law, regards the extent to which these opinions can interpret EC law, which only the Court of Justice has the competence to do.⁴⁷⁴ The prevailing view has been that the Commission can act as legal or economic advisor and that it can perform essentially the same work as the Court in preliminary ruling proceedings with one important limitation being that its views are not binding upon national courts. The fact that already the Community Courts are heavily overloaded speaks in favour of allowing the Commission to fill a certain gap.

⁴⁶⁸ See, in this context, Synodinos, *supra* (1995), pp. 432-433, according to whom, the legal basis for the Greek civil courts' co-operation with the Commission is Arts. 245(1), 249, and 368 *et seq.* of the Code of Civil Procedure in conjunction with Art. 10 EC.

⁴⁶⁹ Compare, on the other hand, the power of the Commission to submit *ex officio* written observation before national proceedings even without the express permission of the court in question (see *infra*).

⁴⁷⁰ See paras. 19 and 29 of the co-operation Notice.

⁴⁷¹ *Ibid.*, paras. 19 and 30.

⁴⁷² See in this respect the critical comments by Gilliams, "Modernisation: From Policy to Practice", 28 ELRev. 451 (2003), p. 462. See also Lucas de Leyssac and Parleani, *supra* (2002), p. 59.

⁴⁷³ Art. L462-3 *Code de commerce*. Compare also Art. 70 of the Swedish Competition Act, which provides that parties to civil proceedings must be given the opportunity to comment on statements submitted by the Commission or the Swedish Competition Authority pursuant to Art. 15 Reg. 1/2003.

⁴⁷⁴ See e.g. reservations by Wahl, "Rapport suédois", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 252. On the ECJ interpretation "monopoly", see Schroeder, "Die Auslegung des EU-Rechts", 44 JuS 180 (2004), p. 181.

The first experiences of this mechanism are rather positive. In 2005, the Commission provided information in reply to three requests from national judges and issued six opinions: three in reply to requests from Belgian courts, one to a Lithuanian court and two to Spanish courts. Three requests received in 2005 were pending at the end of the year.⁴⁷⁵ In order to enhance the consistent application of EC competition law and to avoid conflicting opinions from the Commission and national competition authorities, it was agreed that, as soon as a national court turns to the Commission or to a national authority for an opinion on the application of EC competition law, the Commission and the competition authority of that Member State will inform each other.⁴⁷⁶ Furthermore, in order to increase transparency, the Commission has decided to make publicly available opinions which the Commission has given on the application of the Community competition rules at the request of a national court pursuant to Article 15(1) of Regulation No 1/2003.⁴⁷⁷

dd. Information Exchange between the Commission and National Courts

The co-operation procedure between the Commission and national courts also raises some important questions regarding the kind of information which the Commission can transmit to national courts. One issue is protection of professional and business secrets. The co-operation Notice attempts to reconcile the various conflicting interests by leaving it up to national courts whether to request information covered by professional secrecy. However, it provides for some safeguards: in particular, before transmitting such information, the Commission must ask the national court whether it can offer a guarantee that it will protect confidential information and business secrets. The Commission has opted for this specific kind of “dialogue” with the national courts based on a combined reading of Articles 10 and 287 EC.⁴⁷⁸

⁴⁷⁵ XXXVth Report on Competition Policy – 2005, *op.cit.*, paras. 219-221 and 225 *et seq.* For the first cases during 2004 when Art. 15(1) Reg. 1/2003 was used by national courts to seize the Commission with requests for information or for an opinion, see *Commission XXXIVth Report on Competition Policy – 2004* (Brussels/Luxembourg, 2005), paras. 112-113.

⁴⁷⁶ Reg. 1/2003 has not formally imposed such a duty of mutual information, but it is something that has been decided informally within the ECN.

⁴⁷⁷ Opinions will be posted on the DG COMP website once the judgment in the case in which the opinion was requested has been notified to the Commission pursuant to Art. 15(2) Reg. 1/2003. This is no guarantee that the opinion will be made public because some Member States systematically fail to discharge their duty to communicate relevant national judgments to the Commission under Art. 15(2) Reg. 1/2003 and there may also be national procedural impediments that do not allow such publication.

⁴⁷⁸ See paras. 23-25 of the co-operation Notice. See also Temple Lang, “Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty”, 27 *Ford.IntLJ* 1904 (2004), p. 1922, who reads into Art. 10 EC a more general duty of national courts to enjoin litigants from

Furthermore, the Commission may refuse to transmit any kind of information to national courts, in order to “safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to it”.⁴⁷⁹ This is also intended to cover the correspondence between the Commission and national competition authorities in the framework of the European Competition Network.

A problem arises with regard to corporate statements made in the context of a application for leniency under the Leniency Notice. Whether litigants may request indirectly,⁴⁸⁰ i.e. through the national court, the disclosure of such statements is doubtful.⁴⁸¹ The Commission in its co-operation Notice declares that it will only transmit such information to national courts with the leniency applicant’s consent, as otherwise the accomplishment of its tasks would be jeopardised.⁴⁸² In particular, such disclosure would prejudice the effective enforcement of Community competition law by the Commission.⁴⁸³ In principle, public enforcement by the Commission and its intention to facilitate detection through immunity of fines should not function to the detriment of private enforcement and the compensation of cartel victims; that is why the Leniency Notice cannot interfere with such civil claims, which, in any case, are based on the direct effect of Treaty provisions.⁴⁸⁴

However, there are less onerous ways for these objectives to be pursued than by disclosing documents companies have submitted to the Commission under the Leniency Notice, which would frustrate the Notice’s aim of making detection of hard core restrictions of competition easier, since fewer companies would be willing to come under it. Private litigants will therefore basically⁴⁸⁵ have to rely solely on discovery in the framework of the civil

using documents obtained from the Commission in the context of the EC administrative proceedings, when the Commission has transmitted such documents on the express condition that these cannot be used in other contexts.

⁴⁷⁹ See para. 26 of the co-operation Notice.

⁴⁸⁰ The new co-operation Notice no longer provides for the possibility of litigants to seize directly the Commission. On this point and on the alternative possibilities offered by Reg. 1049/2001, see below.

⁴⁸¹ See Temple Lang, “The Implications of the Commission’s Leniency Policy for National Competition Authorities”, 28 ELRev. 430 (2003), pp. 432-433, who leaves open this possibility.

⁴⁸² Para. 26 of the co-operation Notice. See also paras. 32-33 of the Leniency Notice: “The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council.”

⁴⁸³ See further Blake and Schnichels, “Leniency Following Modernisation: Safeguarding Europe’s Leniency Programmes”, (2004-2) *EC Competition Policy Newsletter* 7, p. 12; D. Voillemont, *Gérer la clémence* (Paris/Bruxelles, 2005), p. 46.

⁴⁸⁴ Leniency Notice, para. 31 *in fine*: “The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC”. See further above.

⁴⁸⁵ On the Reg. 1049/2001 possibilities see below.

proceedings, content themselves with non-lenieny related evidence held by the Commission, or, finally, await and rely on the final Commission infringement decision. Of course, protection is accorded only to the statements specifically prepared by the lenieny applicant for the Commission in the context of the application for lenieny and not to pre-existing documents that the lenieny applicant is in any case required to submit to the Commission.⁴⁸⁶ It is noteworthy that there have recently been cases where private litigants tried to seek discovery in US courts of EC lenieny "corporate statements", i.e. of statements submitted to the Commission in the context of a lenieny application. The Commission has viewed this as a serious risk for the effectiveness of its lenieny programme and has tried to assuage the fears of lenieny applicants by giving them the possibility to make oral statements.⁴⁸⁷ The Commission's current practice is that oral statements made by lenieny applicants are routinely recorded by the Commission,⁴⁸⁸ transcribed and signed by lenieny applicants.⁴⁸⁹ The Commission has very recently published a draft of an amended Lenieny Notice, in order

⁴⁸⁶ See Van Barlingen, "The European Commission's 2002 Lenieny Notice after One Year of Operation", (2003-2) *EC Competition Policy Newsletter* 16, p. 20.

⁴⁸⁷ Initially, foreign plaintiffs in US courts succeeded twice in securing access to statements made by EU lenieny applicants, and failed once. In all these cases the Commission had filed a brief in opposition as *amicus curiae*. Discovery was allowed in two cases in the context of the *Vitamins* cartel: *In Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.D.C. Jan. 23, 2002 and Sept. 30, 2002). It was not allowed in one case: *In Re Methionine Antitrust Litigation*, No. C-99-3491-CRB (N.D.Cal. July 29, 2002). It appears, however, that one of the parties in that case settled, while offering the plaintiffs in exchange the CD-ROM provided to it by the Commission in the EC administrative proceedings, which contained essentially the whole Commission file. On these questions, see generally Burnside and Botteman, "Networking amongst Competition Authorities", 10 *Int TLR* 1 (2004), p. 9; Nordlander, "Discovering Discovery – US Discovery of EC Lenieny Statements", 25 *ECLR* 646 (2004), p. 650 *et seq.*; Levy and O'Donoghue, "The EU Lenieny Programme Comes of Age", 27 *World Competition* 75 (2004), p. 86 *et seq.*; Amory and Marchini Cãmia, "La demande de 'clémence' auprès de la Commission européenne : Effets collatéraux dans d'autres juridictions", Sept. 2005, Vol. II, *e-Competitions*, in: <http://www.concurrences.fr>, p. 2; Guersent, "Table ronde : Les conséquences civiles et pénales dans un contexte d'internationalisation des programmes de clémence", in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 *GP* n° 287-288 7 (2005), pp. 49-50. The recent judgment of the US Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004), refers to the rather different situation where a complainant in a Commission administrative proceeding requested the US courts to order discovery against the alleged competition law infringer. The complainant's aim was to use that evidence before the Commission proceedings, though the Commission itself did not wish to have access to that evidence and, indeed, resisted the complainant's US discovery action by filing two *amicus curiae* briefs urging the US courts to reject that. For a different outcome see *In Re Microsoft Corp.*, M.B.D. No. 06-10061-MLW (2006), where the Massachusetts US District Court rejected Microsoft's request to force software rival Novell Inc. to hand over EU correspondence that Microsoft claimed it needed to defend itself against antitrust charges in Europe.

⁴⁸⁸ The Commission tries to keep such statements short, and excludes business secrets and confidential information to avoid the need for editing. On the oral lenieny procedure, see Van Barlingen, *supra* (2003), pp. 19-20; Van Barlingen and Barennes, "The European Commission's 2002 Lenieny Notice in Practice", (2005-3) *EC Competition Policy Newsletter* 6, pp. 8-10.

⁴⁸⁹ The Commission requests a signature but considers it immaterial whether the transcript is signed or not; the danger of signing a transcript is that this document could potentially be seen as an admission of liability by the company.

to formalise this practice,⁴⁹⁰ which is also followed in the context of certain national leniency programmes.⁴⁹¹

ee. The Duty of Member States to Transmit Copies of Judgments to the Commission

Regulation 1/2003 provides also for a duty of the Member States to forward copies of judgments of their national courts to the Commission. It is noteworthy that while the Commission's draft regulation had proposed to directly impose upon courts the duty to send the Commission copies of their judgments applying Articles 81 and 82 EC, the final text of Article 15(2) of Regulation 1/2003 departs from the Commission proposal and does not place national courts, as such, under this administrative duty. Instead, it will be Member States that must forward the copies of such judgments of national courts to the Commission.⁴⁹² This choice has been very prudent in our view, because courts are not accustomed with such "clerical" duties, which are usually carried out by their registries.⁴⁹³ Besides, courts might have felt under the "direct control" of the Commission and this could backfire in that they might seek to avoid applying EC competition law at all costs in order to escape the exposure to the Commission's scrutiny.⁴⁹⁴ In addition, the Community law duty in question becomes far more concrete, and, thus, more easily justiciable, since it would have been more sensitive and cumbersome to attribute the failure of national courts to apply this provision to the Member State on the basis of Article 10 EC.⁴⁹⁵

⁴⁹⁰ Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, in: <http://europa.eu.int/comm/competition/antitrust/legislation/leniency.html>. The public consultation period expired on 20 March 2006 and a new formal text is expected soon. Compare also option 28 of the Green Paper on damages actions.

⁴⁹¹ This is the case in France. See further Lasserre, "Propos introductifs", in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 GP n° 287-288 7 (2005), p. 14.

⁴⁹² Transmission will take place after the written text of the judgment has been duly notified to the parties of the proceedings. See Tavassi, *supra* (2004), p. 362.

⁴⁹³ See Ehlermann, *supra* (2000a), p. 580, who had expressed reservations as to the initial text of the regulation proposal that imposed the duty of information directly upon the courts. See also the critical comments by Holmes, *supra* (2000), p. 71. Under Greek national law (Art. 24(3) L. 703/1977) the registries of courts that have applied national competition law must forward copies of these judgments to the Greek Competition Committee. However, it is telling that this provision has on the whole been ignored by court registrars, notwithstanding their disciplinary liability.

⁴⁹⁴ This is a fear, however, that is still expressed under the new text of Art. 15(2) by some commentators. See e.g. Terhechte, "Die Rolle des Wettbewerbsrechts in der Europäischen Verfassung", in: Hatje & Terhechte (Eds.), *Das Binnenmarktziel in der Europäischen Verfassung* (Baden-Baden, 2004), p. 124.

⁴⁹⁵ For examples of such attribution see Köbler, *op.cit.* para. 59; case C-129/00, *Commission v. Italy*, [2003] ECR I-14637, paras. 29-33.

It should also be emphasised that the Commission initially proposed in the White Paper the more far-reaching obligation to inform the Commission of all *proceedings* where Articles 81 and 82 EC are *invoked* before national courts.⁴⁹⁶ However, this proposal was already abandoned in the September 2000 draft regulation and according to the final text of Regulation 1/2003, Member States will only have to forward copies of *judgments* to the Commission, in particular judgments where Articles 81 and 82 EC are *applied* and not just *invoked*.⁴⁹⁷ This essentially means that the Commission will have no other way of learning about such proceedings before judgment is reached, and must rely on being informed by litigants.⁴⁹⁸ A further remark to be made here is that national competition authorities are not directly concerned by Article 15(2) of the Regulation, although there had been proposals for the Commission to use them as its local agents for that purpose.⁴⁹⁹

One last question is whether the Commission must be furnished only with copies of final judgments which bring the litigation to an end, or whether other judgments which might be final in their nature but do not conclude the proceedings as a whole must also be forwarded. They might include final partial or interim judgments such as a judgment granting a preliminary injunction. While the letter of Article 15(2) of Regulation 1/2003 may seem to refer only to final judgments, a more attentive reading may lead to the conclusion that preliminary injunction judgments should also be covered, as they too “decide on the

⁴⁹⁶ Para. 107 of the *White Paper*. The initial Commission proposal to require national courts to inform the Commission of proceedings where EC competition law was *invoked*, was criticised because it was disproportionately onerous and technically difficult to comply with. See e.g. Cooke, *supra* (2001a), pp. 555-556. According to Martinez Lage, *supra* (2000), p. 9, fn 24, it might have been more reassuring to extend this obligation to all cases, where the relevant competition provisions were *invoked*, irrespective of whether they were actually *applied* or not in the judgment. Although more preferable, such a solution would further increase the bureaucracy involved. In any case it is fair to say that the *application* of a legal provision as such has a rather wide sense and it is at the Member State's discretion to identify those cases where the Treaty competition provisions were *applied* by its courts.

⁴⁹⁷ It cannot be excluded that a particular national law may impose more substantial duties on its national courts in that respect. Such is the case in German law, where by virtue of s. 90(1) GWB German courts entertaining civil actions have to inform the *Bundeskartellamt*, though not the Commission, of all legal *actions* arising from Arts. 81 and 82 EC.

⁴⁹⁸ See Paulis and Gauer, *supra* (2003), p. 73. Martinez Lage, *supra* (2000), p. 9, believes that this is sufficient. This is now the formalised practice in England where any party whose statement of case raises or deals with an issue relating to the application of Arts 81 and 82 EC or the equivalent national provisions must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim. See *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, para. 3. The same duty of notification is imposed on appellants. See *Practice Direction 52 – Appeals*, para. 21.10A.

⁴⁹⁹ See Cooke, *supra* (2001a), p. 556. The non-involvement of NCAs in this mechanism may be explained by the fact that the final text of Art. 15(2) Reg. 1/2003 imposes on Member States, not the courts, the duty to transmit judgments to the Commission. It would certainly have been inappropriate for a Community text to provide for the allocation of such duties inside national administrations.

application of Article 81 or Article 82 of the Treaty".⁵⁰⁰ Such a reading would in any event correspond better to the provision's objective of ensuring more consistent application of the Treaty competition rules by national courts, through the possibility of a Commission intervention under Article 15(3) of the Regulation.⁵⁰¹ The *effet utile* of this provision would be weakened if the obligation to forward copies of judgments did not cover preliminary injunctions too, since in many Member States such interim measures are *de facto* final, as the parties usually settle afterwards and the issue never goes to a full hearing.⁵⁰²

ff. The *Amicus Curiae* Mechanism

A further new mechanism of co-operation that Article 15(3) of the new Regulation introduces for the first time⁵⁰³ is the power of the Commission and of national competition authorities to file *amicus curiae* briefs in national proceedings.⁵⁰⁴ This is intended to be used more as a preventive mechanism in order to draw the courts' attention to specific competition law problems. Again, there have been similar mechanisms in some Member States, already before EC competition law modernisation, that have provided for the national competition authority's *ex officio* power to give an opinion before another regulatory authority or a court.⁵⁰⁵

⁵⁰⁰ The text of Art. 15(2) Reg. 1/2003 refers to "any written judgment of national courts *deciding on the application of Article 81 or Article 82 of the Treaty*" (emphasis added).

⁵⁰¹ See below on that possibility.

⁵⁰² This is the case for example in Greece and in Ireland. For Ireland, see Maher, "Ireland", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. II, *Benelux and Ireland* (Baden-Baden, 1994), p. 293.

⁵⁰³ For a rare case where the European Commission has intervened in a national proceeding long before Reg. 1/2003 came into effect see *Hasselblad v. Orbison* (CA), [1985] QB 475; [1984] 3 CMLR 679. This case is rather atypical, in that it concerned a libel action brought against a person that had complained to the Commission. The Commission intervened not to make submissions of substantive competition law but in order to stress that the effectiveness of competition law enforcement would be impaired if potential complainants ran the risk of being sued for libel in national courts.

⁵⁰⁴ It should be stressed that the continental European legal tradition is not very familiar with the *amicus curiae* briefs, although recently some openings seem to hesitantly emerge with regard to participation in civil proceedings by certain independent administrative authorities. See further Kerameus, "Procedural Tools in the Different European States Concerning the Uniform Interpretation of Law by the Supreme Courts: A Comparative Presentation", 53 RHDI 613 (2000), p. 619.

⁵⁰⁵ This is the case in France and Germany. In France the competent authority to intervene has been the Minister of Economy, who, pursuant to Art. L470-5 *Code de commerce*, does not become party to the proceedings, but rather fulfills a *mission de police juridique* in ensuring the consistent application of national competition law (see Boulanger, "Frankreich", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. IV, *France* (Baden-Baden, 1997), p. 192; CA Paris, 16-1-89, *SA Technisom France v. SARL Serap Ameublement et al.*, D. 1990, somm. 106; Cass.com., 7-7-04, *Ministre del'économie et Syndicat des détaillants spécialistes du disque et al. v. Société Carrefour France*, 1 *Concurrences* 68 (2004)). This provision of the *Code de commerce*, read in conjunction with Art. 470-6, extends also to Arts. 81 and 82 EC (see Idot, *supra* (2004b), p. 161). Under Art. L470-6, also the *Conseil de la concurrence* has the power to intervene as *amicus curiae* in a pending case before the French civil courts, when an EC competition law question arises (Art. L470-6 here does nothing more than refer to Art. 15 Reg. 1/2003). In Germany the *Bundeskartellamt* has had the power to appoint

There are naturally certain reservations with regard to this new instrument,⁵⁰⁶ but on the overall this exceptional mechanism could serve well the aim of the Commission to help national courts come to grips with difficult competition issues that require a high degree of consistent application throughout the European Union.⁵⁰⁷ In that sense, such *amicus curiae* briefs complement the preliminary reference procedure of Article 234 EC,⁵⁰⁸ although, naturally, the opinion of the Commission, unlike the judgment of the Court of Justice, cannot bind the national court.⁵⁰⁹

The Commission and national competition authorities are intended not to be parties to the proceedings, but rather to act as an objective, neutral and independent economic expert.⁵¹⁰

a representative authorised to submit written statements, to attend hearings and give evidence, and even to address questions to the parties, witnesses and experts (s. 90(2) GWB). See further Schroeder, Deselaers, Federle, Seeliger and Hartog, "Germany", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003), p. 193. Of course, most national competition laws that have been amended following the modernisation, now have similar provisions on the possibility of *amicus curiae* interventions by their NCAs.

⁵⁰⁶ Although the Commission had acknowledged in the Explanatory Memorandum preceding the regulation proposal (at p. 12) that such submissions would be made in accordance with the procedural rules in force in the Member State in question and that "the proposal does not purport to harmonise national procedural law", there had been a certain degree of criticism of this "intrusion" of the Commission into the national judicial systems. One serious doubt was whether a Council Regulation without a specific legal basis and with no national implementing measures could impose obligations on national courts and give the power to the Commission to intervene in national proceedings on its own initiative (see Bechtold, *supra* (2000), p. 2430). Another doubt was whether the right of national competition authorities to intervene in such national proceedings could be a question of Community or national law (see Gröning, *supra* (2001b), p. 89).

⁵⁰⁷ See the article-by-article Explanatory Memorandum under Art. 15 of the September 2000 regulation proposal, which refers to questions "of considerable importance for the consistent application of Community competition law". See also Kjolbye, 39 CMLRev. 175 (2002), p. 179.

⁵⁰⁸ See Kjolbye, 39 CMLRev. 175 (2002), p. 179, fn. 16; Calvo Caravaca and Canedo Arrillaga, *supra* (2003), p. 39. While Art. 234 EC remains the undisputable co-operation channel between the national and the Community judicial level, it has some limitations in competition law, since the preliminary reference procedure is only intended to interpret the law and not to deal with the facts of a case, which are left to the national judge. On Art. 234 EC's inadequacies see already Steindorff, *supra* (1983), p. 128, who pointed out that in a - at that point still remote - decentralised application of Art. 81(3) EC, the preliminary reference procedure would not help much, since Art. 234 EC rulings are "more or less abstract", thus contributing little to antitrust decisions. See also Montag, "The System of Legal Exception", 37 CDE 145 (2001), p. 158; Ehlermann and Atanasiu, *supra* (2002), p. 76; Hirsch, *supra* (2003), p. 250. Some authors have suggested the reconsideration of the Art. 234 EC split between interpretation and application of the law (see e.g. Holmes, *supra* (2000), pp. 64-65; Deringer, "Reform der Durchführungsverordnung zu den Art. 81 und 82 des EG-Vertrages", 36 EuR 306 (2001), p. 318 *et seq.*; Ehlermann and Atanasiu, *supra* (2002), pp. 77-78). *Contra* Lenaerts and Gerard, *supra* (2004), p. 339 *et seq.*, who stress that in reality the rulings of the ECJ are usually preceded by a very fact-intensive reasoning. In any case, these co-operation mechanisms between the Commission and national courts should be welcomed and seen complementarily and not antagonistically with the Art. 234 EC procedure. See Paulis, *supra* (2001a), p. 406, who explains these mechanisms, particularly the one of Art. 15(1) Reg. 1/2003, by reference to the ECJ's limitations under Art. 234 EC and to the fact-based nature of competition law.

⁵⁰⁹ Exceptionally, the Art. 15(3) mechanism and Art. 234 EC might operate in practice in a conflictual manner. A national court faced with a Commission *amicus curiae* brief with which it disagrees, might be tempted to seek support from the Court of Justice by making a preliminary reference. See Cederschiöld, "Efficient Protection of Competition in an Enlarged Community through Full Association of National Competition Authorities and National Courts", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition>, pp. 3-4.

⁵¹⁰ See Parlasca, "Should the Competition Authorities Be Authorized to Intervene in Competition Related Problems, Particularly when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Germany", LIDC Questions 2001/2002, in: <http://www.ligue.org>, p. 5; Idot,

This mechanism has raised some concerns of due process mainly from the practitioners' side.⁵¹¹ The fear is that the Commission's statements might be followed in a copy-paste manner by the judge, without the parties having the opportunity to effectively contradict them. In addition, while Article 15(3) of Regulation 1/2003 restricts this intervention of the Commission only to cases where "the coherent application of Article 81 or 82 of the Treaty so requires" and the co-operation Notice states that the Commission will be guided in its submissions only by its duty to defend the public interest and not any private interests involved, it is not always easy for the Commission not to take sides. The water-tight distinction between the public and the private interest in competition cases, a distinction, of which the Commission is so often fond, is totally fictitious in our view.

Therefore, notwithstanding the fact that the Commission in its co-operation Notice is so eager to stress its detachment from the actual litigation,⁵¹² it is difficult to see how one or the other of the parties may not be entitled to cross-examination, especially when the national court gives them this opportunity.⁵¹³ Indeed, the latest post-modernisation amendments of some national competition laws are more liberal in this respect and provide that the parties can at least make statements on top of the Commission's or the national competition authority's observations,⁵¹⁴ or that the observations of the national competition authority (though not those of the Commission) will be subject to the parties' being heard.

It should be stressed that the conditions for the submission of observations by the Commission and by national competition authorities are different. The latter are the preferred *amici curiae* and may submit their observations on any issue "relating to the application of Article 81 or Article 82 of the Treaty". The former, on the other hand, can submit such observations only exceptionally, if "the coherent application of Article 81 or Article 82 of the

supra (2004b), p. 184; Cooke, *supra* (2004b), pp. 658-659. On the principles of objectivity and neutrality in the Commission's co-operation with national courts see Schröter, *supra* (2003), p. 47.

⁵¹¹ See e.g. Bellis, "Les défis de la modernisation du droit européen de la concurrence", 11 JdT (Eur.) 73 (2003), p. 74. For a more general critical assessment of this mechanism see Cooke, *supra* (2001a), pp. 557-558, addressing the question of the protagonist role, which, according to the author, the Commission will play *de facto* in national proceedings and which may seem to be in conflict on occasions with the principle of party initiative that applies to civil proceedings.

⁵¹² See e.g. paras. 19 and 29 of the co-operation Notice.

⁵¹³ See in this sense Cooke, *supra* (2001b), p. 17; Favre, *supra* (2001b), p. 82; Lenaerts and Gerard, *supra* (2004), p. 333. This is a very sensitive issue that eventually may have to be resolved by the Court of Justice through a preliminary reference by a national court, before which the Commission has exercised its power of *amicus curiae* intervention. The Commission may indeed realise this sensitivity. See in this regard Director General Lowe, *supra* (2003c), p. 6, acknowledging that "it is of course up to the courts to involve the parties – as appropriate in the respective procedural framework".

⁵¹⁴ Art. 70 of the Swedish Competition Act.

Treaty so requires".⁵¹⁵ National competition authorities had not been initially spelled out as possible *amici curiae* in the 1999 White Paper. The proposal to use them as agents of the Commission in this context was first aired in the 2000 draft regulation, as a result of the reservations that had been expressed.⁵¹⁶ Those reservations explain also the re-dimensioning of that mechanism by the new Regulation, which refers firstly to national competition authorities and only secondly to the Commission.⁵¹⁷ Finally, the Commission and national authorities will have the power to submit on their own initiative written observations, while the submission of oral observations will depend on the national court's permission.⁵¹⁸

In order for the Commission and national competition authorities to be able to make use of the *amicus curiae* mechanism, Article 15(3)(b) of Regulation 1/2003 imposes a duty upon national courts to transmit to the former any documents necessary for the assessment of the case. This constitutes the only direct duty placed upon the courts in the co-operation context of Article 15 of the new Regulation and it is one of "administrative" or "clerical" nature, discharged via the courts' registries.⁵¹⁹ It should be noted that there are no sanctions involved, if national courts fail to adhere to that obligation (e.g. procedural irregularity of the judgment in question that could lead to its cassation under national procedural law). Only in wholly exceptional circumstances, where the courts of a Member State would refuse in a number of occasions to co-operate with the Commission under these provisions, could the Commission initiate a Treaty infringement action of Article 226 EC against that Member State or, under certain conditions, could an individual advance a damages claim against the Member State concerned under the *Francovich* and *Köbler* principles.

The Article 15(3)(b) duty of national courts to forward documents necessary for an eventual *amicus curiae* intervention must be seen in conjunction with the Article 15(2) duty of Member States to transmit to the Commission copies of judgments. The two provisions are intended to complement each other: in other words, it will only be at the stage when the

⁵¹⁵ Art. 15(3)(a) R eg. 1/2003. According to Pace, *supra* (2004), p. 175, the interest of the NCAs differs from that of the Commission. The former would aim at reducing the risk of the Member State being answerable for its judicial organs' failure to respect Community law, while the latter aim at safeguarding the coherent application of Community law. Such a view, however, is not in perfect harmony with the supranational nature of the Community institutional and legal system and neglects the fact that NCAs are essentially acting as *administration communautaire indirecte*.

⁵¹⁶ See e.g. Cooke, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 482.

⁵¹⁷ See further Cooke, *supra* (2001b), pp. 16-17.

⁵¹⁸ Of course, national procedural law may grant NCAs wider powers in this context. Reg. 1/2003 does not prohibit or exclude this. See on this point Kovar, *supra* (2003), p. 484. Where, under national law, the court proceedings are only oral, then the effectiveness of Art. 15(3) Reg. 1/2003 necessitates that the Commission and the NCA be entitled to make oral submissions, irrespective of the authorisation of the national court in question. See Idot, *supra* (2004b), p. 184.

⁵¹⁹ See para. 33 of the co-operation Notice.

Commission has in its possession a first instance national judgment, that it will use Article 15(3)(b) to request the documents of that case from the specific court. This means that in the majority of cases the Commission will intervene only at the appeal stage, after it will have accordingly been alerted through the mechanisms of paragraphs (2) and (3)(b) of Article 15 of the new Regulation.⁵²⁰

gg. Other Indirect Co-operation Mechanisms or Support for National Courts

In addition to these more formal ways of co-operation between the Commission and national courts, there may be other informal and indirect forms of “dialogue”.

A first question is whether informal guidance letters issued by the Commission⁵²¹ at the request of undertakings may also have a bearing upon an on-going litigation procedure. The possibility of undertakings to approach the Commission informally, in order to seek guidance, is in essence a concession, aiming at compensating to a certain extent the loss of legal certainty of companies as a result of abolishing the notification and prior authorisation system. These informal channels of co-operation would be most necessary in exceptional cases of particularly difficult questions regarding the interpretation of Article 81 EC. In its regulation proposal of September 2000 the Commission had declared that it would “remain open to discuss specific cases with the undertakings where appropriate; in particular, it [would] provide guidance regarding agreements, decisions or concerted practices that raise[d] an unresolved genuinely new question of interpretation”.⁵²² It had also reiterated its resolve to issue such reasoned opinions in the public interest in its Joint Statement with the Council on the Network.⁵²³

Thus, the Commission’s Notice on guidance letters promises to offer guidance in exceptional circumstances of “genuine uncertainty”, referring to “novel or unresolved questions for the

⁵²⁰ See Marengo, “Consistent Application of EC Competition Law in a System of Parallel Competences”, in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition>, p. 3, who submits that this would be sufficient to ensure coherence and it would also save Commission’s resources. While this is how the system is intended to work in practice, it should not be totally excluded that in exceptional cases the Commission may use Art. 15(3)(b) Reg. 1/2003 already at the first instance stage of an on-going litigation. In such cases the Commission will have sufficient information about that litigation through some other informal channel, presumably through one of the litigants (see in that regard Bellis, *supra* (2003), p. 74).

⁵²¹ To be more precise, these letters will be issued not by the Commission, as such, but by DG COMP.

⁵²² See the Explanatory Memorandum of the regulation proposal, p. 10; see also Rocca, “Sécurité juridique dans un système de compétences parallèles”, in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, <http://europa.eu.int/comm/competition>, p. 5.

⁵²³ See Statement by the Commission, accompanying the Joint Statement of the Council and the Commission, *op.cit.*; Recital 38 Reg. 1/2003.

application of Articles 81 and 82".⁵²⁴ Companies are not entitled to obtain such opinions and in no circumstances will this informal mechanism re-introduce a notification system from the back door. A guidance letter is without prejudice to the Commission's powers as to the subsequent assessment of the same issues and cannot bind national courts,⁵²⁵ although, it is presumed that such Commission statements can be of persuasive value before the latter, their legal effects thus resembling those of the old comfort letters.

The Notice requires that in order for the Commission to exercise its discretion and proceed to a guidance letter, five cumulative conditions, three positive and two negative, must be satisfied.⁵²⁶

- (a) the question involved cannot be clarified by reference to the existing EC legal framework, to the case law, to publicly available notices, communications or guidelines, to the decision-making practice or to previous guidance letters;
- (b) the clarification of the novel question is useful, taking into account the economic importance from the point of view of consumers, and/or the possible correspondence of the practice in question to "a more widely spread economic usage in the marketplace", and/or the scope of the investments involved and whether the transaction affects structural operations (e.g. partial function joint ventures);
- (c) the guidance letter can be issued on the basis of information provided to the Commission;
- (d) the questions involved are not identical or similar to questions, with which the Court of Justice or the Court of First Instance are seized in a pending case;
- (e) the specific practice concerned is not subject to proceedings pending before the Commission, a national competition authority, or a national court.

It is clear, therefore, from the last negative condition that the Commission is not prepared to issue a guidance letter requested by parties to an on-going litigation. This contrasts with the 1993 co-operation Notice which allowed for an indirect dialogue between national courts and the Commission, when the latter was seized by the parties to the litigation - rather than by the court directly.⁵²⁷ The possibility of that kind of indirect mechanism of the old co-operation Notice can be explained by the Commission's desire to show some flexibility in

⁵²⁴ Notice on Guidance Letters, para. 5. Note the extension of the possibility to issue such letters to Art. 82 EC cases. On this new tool of competition policy see e.g. F.L. Fine, *The EC Competition Law of Technology Licensing* (London, 2006), pp. 25-30. That author rightly stresses the importance of such letters for technology transfer agreements.

⁵²⁵ Paras. 24 and 25 of the Notice.

⁵²⁶ Para. 9 of the Notice.

⁵²⁷ Para. 40 of the 1993 co-operation Notice.

view of national procedural obstacles that could not accommodate a more direct system of co-operation. In such cases, indeed, it was easier for a national court, in its difficulty to seize itself the Commission, to induce the litigants to do so. Regulation 1/2003, however, makes such indirect channels no longer useful, since the express provisions of the new Regulation supersede any national procedural obstacle or judicial practice that may hinder the more direct and structured co-operation mechanism between the Commission and national courts. In our view, this explains the withdrawal by the Commission in the new Notice on guidance letters of its availability to be seized by parties to an on-going litigation.

In any case, the Commission only excludes the possibility to issue guidance letters if the *same* practice to which the request refers is subject to a *pending* national proceeding. This means that a guidance letter would be possible if there is no litigation as yet, in which case the already issued letter would be subsequently of use to the national court when an action is filed. Then, the Notice does not seem to exclude the possibility of informal guidance being given to undertakings, if the object of their request refers to a practice *different, yet similar*, with the one currently pending before a national court. In such a case, if the Commission were to accept to issue a guidance letter, the litigants in the pending national proceedings could use that letter before the national court and the court could attribute to such a statement a certain degree of persuasiveness.

An opinion on Articles 81 and 82 EC may also be given by national competition authorities. Such opinions are already available for example under UK law, by the OFT.⁵²⁸ They would be given "where individual cases give rise to genuine uncertainty because they present novel or unresolved questions" for the application of the Treaty competition provisions. It is also recognised that any written opinion given by the OFT "would not be binding on the Commission, any other NCA or the courts".⁵²⁹ Furthermore, national courts will continue to have the possibility to rely on old comfort letters that were given before 1 May 2004. Such letters will continue to have importance for the time period that the Commission has given them and for as long as the factual situation remains identical.⁵³⁰

⁵²⁸ See Department of Trade and Industry, *op.cit.*, para. 3.22.

⁵²⁹ *Ibid.* While Reg. 1/2003 clearly does not prohibit NCAs from giving such opinions on Arts. 81 and 82 EC, which are in any case informal, extra-statutory, and non-binding, nevertheless some doubts exist as to the possible content of these opinions by NCAs. It should not be forgotten that under the new Regulation NCAs do not have the power to adopt inapplicability or "positive" decisions finding that the prohibitions of Arts. 81 and 82 EC do not apply. In such cases they can only declare that there are no grounds for action on their part (compare Arts. 5 and 10 Reg. 1/2003). In this regard, compare the hesitations expressed by Ehlermann, *supra* (2000a), p. 574; Burrichter, *supra* (2001), p. 546.

⁵³⁰ See above on the transitional provisions of Reg. 1/2003, in particular Art. 43(1) which refers to exemption decisions given before 1 May 2004. By analogy comfort letters given before that date should remain

Another possibility that private litigants may use in order to seize the Commission and request information necessary to them in the context of an on-going litigation, is to rely upon general Community legislation on access to documents held by the EU institutions. Thus, Regulation 1049/2001 lays down the general framework for such access to information.⁵³¹ Under these rules, an EU institution may refuse access to such documents, only when this would undermine the protection of:

- (a) the public interest as regards public security, defence and military matters, international relations, or the financial, monetary or economic policy of the Community or a Member State;
- (b) privacy and the integrity of the individual;
- (c) commercial interests of a natural or legal person, including intellectual property;
- (d) court proceedings and legal advice;
- (e) the purpose of inspections, investigations and audits.⁵³²

When disclosure of a document in its entirety is not possible, the Regulation provides for a right of partial access. In a recent case third parties tried to rely on that Regulation in order to have access to the Commission's file in a cartel proceeding. Access to that information would have enabled those parties to bring civil claims for damages against the cartel members in Member States courts. The Commission resisted this request mainly because allowing third parties access to such information would deter firms from co-operating with the Commission and would be detrimental to inspections and investigations in future cases. The CFI disagreed and rendered a nuanced judgment, in which it held that the Commission is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request in order to determine whether partial access was possible. The Court added that it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that derogation from that obligation to examine the documents may be permissible.⁵³³

useful. See further on this, Gauer, Dalheimer, De Smijter, Schnichels and Laurila, "Regulation 1/2003 and the Modernisation Package Fully Applicable since 1 May 2004", (2004-2) *EC Competition Policy Newsletter* 1, p. 6.

⁵³¹ Regulation 1049/2001 of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, OJ [2001] L 145/43.

⁵³² Art. 4 Reg. 1049/2001.

⁵³³ Case T-2/03, *Verein für Konsumenteninformation v. Commission*, [2005] ECR II-1121, para. 65 *et seq.* See comment by Muguet-Poullennec, 4/2005 *Revue Lamy de la Concurrence* 75.

d. Strengthening the Supremacy of Community over National Proceedings

aa. *Masterfoods* and Article 16 of Regulation 1/2003

As already mentioned above, while the European Court of Justice moved quickly to recognise the direct effect of Articles 81 and 82 EC and to consider national courts on a par with the Commission in a system of parallel competences – exception made for Article 81(3) EC, it was at the same time aware of problems of conflict that this system might lead to. Such conflicts were considered undesirable from a number of points of view: first, because the fundamental principle of legal certainty would be seriously impaired, second, because of the whole supranational system of the relationship between Community and national proceedings and the principles of supremacy and uniformity of Community law, and third, because, from a purely competition angle, companies would not be able to rely on a level-playing field of antitrust enforcement all-over the Community. The approach of the Court of Justice was initially to encourage the national courts to stay their proceedings and await the Commission's decision. This implied certainly a degree of deference but the Court at that time did not present this as a fully-fledged duty based on Community law. It was rather something desirable in order to avoid legal uncertainty.⁵³⁴

Gradually, however, the Court of Justice started using a more stringent language. Essentially, this meant that national courts were indeed under a duty to stay proceedings and avoid conflicting decisions.⁵³⁵ *Delimitis* encapsulates this gradual shift towards a system of deference to Commission decisions. There, the Court of Justice made it clear that there was something more than just the principle of legal certainty at stake. That was the Commission's fundamental role in the "implementation and orientation of Community competition policy".⁵³⁶ This became clearer in *Masterfoods* where the Court went even further in subjecting national courts to a clear duty, based on Article 10 EC, not to take decisions

⁵³⁴ See above on the competence of national courts to apply the Treaty competition provisions under the old system of enforcement.

⁵³⁵ On legal certainty in this context, see Basedow, *supra* (1996), p. 582. Usually national courts have proved ready to suspend their proceedings in expectation of a Commission decision. In England such a stay of proceedings may take place at any stage of the Commission proceedings, while the court may sometimes prefer not to suspend and proceed to preparatory steps as long as these steps do not prejudice the Commission's decision (see *MTV Europe*, *op.cit.*). See further, on the attitude of English courts with references to case law, Cutting, *supra* (2002), pp. 32-33; R. Nazzini, *Concurrent Proceedings in Competition Law, Procedure, Evidence and Remedies* (Oxford, 2004), p. 156 *et seq.*

⁵³⁶ *Delimitis*, *op.cit.*, para. 44.

"running counter to" decisions of the Commission, in case the Commission has already reached a decision on the case in question.

The facts of that case deserve to be mentioned, since they constitute one of the few cases of direct conflict between a national judgment and a Commission decision. The Irish High Court, dealing with ice cream freezer exclusivity in Ireland, had found that Articles 81 and 82 EC were not breached.⁵³⁷ While an appeal was pending, the Commission initiated proceedings and reached the opposite conclusion.⁵³⁸ The Irish Supreme Court on appeal seized the Court of Justice with a preliminary reference, while expressing disapproval of the Commission decision which had disregarded the national judgment.

The Court of Justice in a rather bold judgment stressed the duty of national courts (a) to avoid giving decisions which would conflict with a decision contemplated by the Commission and, more importantly, (b) not to take decisions running counter to those already adopted by the Commission.⁵³⁹ The Court's ruling is based on four pillars:

- (a) First, the Court started from the premise that the Commission's primacy over national proceedings is justified "in order to fulfil the role assigned to it by the Treaty".⁵⁴⁰ To that end, the Court proceeded to an explicit reference to Article 85(1) EC, according to which "the Commission shall ensure the application of the principles laid down in Articles 81 and 82".⁵⁴¹
- (b) Second, the Court referred to Article 10 EC which imposes upon national courts a duty to ensure the effectiveness of Community law;⁵⁴²

⁵³⁷ *Masterfoods v. HB Ice Cream*, [1992] 3 CMLR 830. For a presentation of the case, see also Maher, *supra* (1999), pp. 67-68, 140-141. A conflict between the Commission and the Irish High Court had again happened in the *Magill* case. See case T-69/89, *Radio Telefis Eireann (RTE) v. Commission*, [1991] ECR II-485 and case T-76/89, *Independent Television Publications Ltd. (ITP) v. Commission*, [1991] ECR II-575; confirmed on appeal in cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. Commission*, [1995] ECR I-743.

⁵³⁸ In its Decision, the Commission considered that "it is not inconsistent with the principles governing the concurrent powers of the national courts and the Commission in the application of Article [81(1)] and Article [82] of the Treaty, for the Commission to take a decision which differs from a judgment delivered by a national court, provided that there exists a sufficient Community interest in doing so". Such an interest may consist "in settling fundamental questions about business practices which are found throughout the Community". According to the Commission, the resulting conflicts could be resolved by the European Courts through Arts. 230 and 234 EC (Commission Decision 98/531/EC of 11 March 1998 (*Van den Bergh Foods Ltd.*), OJ [1998] L 246/1, para. 279).

⁵³⁹ *Masterfoods*, *op.cit.*, paras. 51-52.

⁵⁴⁰ *Masterfoods*, *op.cit.*, para. 46.

⁵⁴¹ It is noteworthy that this specific Article was amended by the Treaty of Amsterdam. Previously the text included the words "as soon as it takes up its duties" between "shall" and "ensure". The amendment means that the provision should no longer be treated as temporary or transitional; rather it constitutes an important basis for the Commission's central role in EC competition law enforcement.

⁵⁴² *Masterfoods*, *op.cit.*, paras. 49, 56.

- (c) Third, the Court emphasised the sole competence of the Community Courts to examine the legality of Commission decisions.⁵⁴³ Under the *Foto-Frost*⁵⁴⁴ line of case law, national courts cannot consider Community acts as invalid, but must refer the question of validity to the Court of Justice, which is the sole judge that can declare their invalidity.
- (d) Finally, the Court relied on the general principle of legal certainty and referred in that respect to *Delimitis*.⁵⁴⁵

This line of argument is very interesting because it dissipates the fear that the *Delimitis* principles on the duty of national courts to avoid conflicting decisions might have been motivated by the Commission's traditional exemption monopoly.⁵⁴⁶ The Court's fundamental reliance on Articles 85 and 10 EC, rather than exclusively on the general principle of legal certainty as was the case in *Delimitis*,⁵⁴⁷ indicates that in a fully decentralised system of parallel competences the supremacy and uniformity of Community competition law, as applied by the supranational organ, the Commission, must not be compromised by national courts and authorities.⁵⁴⁸

Masterfoods was decided at a very critical time in the context of modernisation and offered the Commission substantial support in its decentralisation drive.⁵⁴⁹ Already before *Masterfoods* many authors and even national judgments had taken a very deferential approach vis-à-vis the Commission, relying on the exigency of consistent application of Community competition law, on the supremacy of EC law, and on Article 10 EC.⁵⁵⁰

⁵⁴³ *Masterfoods*, *op.cit.*, paras. 50, 53, 54, 57.

⁵⁴⁴ Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

⁵⁴⁵ *Masterfoods*, *op.cit.*, para. 51.

⁵⁴⁶ See on this issue Ehlermann, *supra* (2000b), p. 2; Jaeger, *supra* (2000), p. 1067; Paulis, *supra* (2001a), p. 420; Venit, *supra* (2001), p. 474; Gröning, *supra* (2001a), p. 586. Such a fear was, however, unjustified, because the *Delimitis* principles were clearly applicable not only to Art. 81(3) EC, but also to Arts. 81(1) and 82 EC (see *Delimitis*, *op.cit.*, paras. 47 and 52 *in fine*).

⁵⁴⁷ *Delimitis*, *op.cit.*, para. 47; cases C-319/93, C-40/94 and C-224/94, *Hendrik Evert Dijkstra et al. v. Friesland (Frico Domo) Coöperatie et al.*, [1995] ECR I-4471, para. 28. In *Delimitis* there was also no express reference to Art. 85(1) EC, though in para. 44 the Court implicitly relied on the principle emanating from that provision. See also Bartels, "Kooperation zwischen EU-Kommission und nationalen Gerichten im europäischen Wettbewerbsverfahren: Einige Anmerkungen zum *Masterfoods*-Urteil des EuGH", 43 ZfRV 83 (2002), p. 88, stressing the *Masterfoods* departure from the *Delimitis* reasoning which was essentially based on legal certainty.

⁵⁴⁸ See Hirsch, *supra* (2003), p. 249.

⁵⁴⁹ See Komninos, *supra* (2002), pp. 447-449.

⁵⁵⁰ Pre-*Masterfoods* some commentators had considered incompatible such binding force of Commission decisions with the parallel competence of national courts to apply the competition provisions and with the principles of judicial independence and separation of powers. See e.g. Marengo, *supra* (1994), p. 615 *et seq.*; Jones and Sharpston, *supra* (1996-97), p. 92; Temple Lang, *supra* (1998), p. 118; Marengo, *supra* (2001a), p. 135; *idem*, *supra* (2001b), p. 172; Schröter, *supra* (2003), p. 324. However, for the opposite view see e.g. Synodinos, *supra* (1995), pp. 434-435; Stuyck, *supra* (1995), pp. 1514, 1517; Saggio, *supra* (1997), pp. 12-13; Kerse, *supra* (1998), p. 442; Temple Lang, *supra* (1999), p. 278; Paulis, *supra* (2001a), p. 420; Siragusa, *supra*

Nevertheless, the passage to a system where the competences of the Commission, national courts and national authorities are fully and purely parallel, might have accentuated undesirable conflicts.⁵⁵¹ Indeed, deference among national judges for the views of the Commission under the previous system was more a question of assumption than of legal and explicit imposition.⁵⁵² Although a fundamental principle was that national courts had to apply Community competition law in a consistent manner with the Commission subject to the Court's supervision, this could not exclude conflicts. For this reason, the Court's powerful and clear pronouncement in *Masterfoods* gave the Commission the strength to advocate a more Community-friendly legislative solution to this problem in the negotiations leading to the adoption of Regulation 1/2003.

It is indeed telling that the Commission's had used a much less stringent language in its draft regulation of September 2000, speaking of a duty of national competition authorities and courts to "*use every effort to avoid* any decision that conflicts with decisions adopted by the Commission".⁵⁵³ However, this text was superseded by the *Masterfoods* ruling which went even further in stressing that national courts (and, by implication, authorities) *cannot* take decisions running counter to a Commission decision, not even one that conflicts with a prior judgment by a national court of first instance.⁵⁵⁴ As a result, Article 16(1) of the new Regulation adopted the Court of Justice's ruling verbatim.⁵⁵⁵

bb. The Scope of the Supremacy Rule of *Masterfoods* and Article 16 of Regulation 1/2003

Some commentators rejected the "primacy of the Commission", i.e. of an administrative authority, over decisions of national judicial organs,⁵⁵⁶ and considered *Masterfoods* a

(2001), pp. 450-451. For French judgments holding that Commission negative clearance decisions bound the national courts see Mail-Fouilleul, *supra* (2002), p. 28, fn. 140.

⁵⁵¹ See e.g. former Commissioner Monti, "Competition Law Reform", Speech Made at the CBI Conference on Competition Law Reform, London, June 12th 2000, in: <http://europa.eu.int/comm/competition/speeches>, p. 4; Jacobs, "Modernisation de la politique communautaire de la concurrence : Une réflexion des entreprises", *Petites Affiches*, 5-11-2001, No. 220, 30, p. 31.

⁵⁵² See Putman, *supra* (1998), pp. 382-383; A. Arnulf, *The European Union and its Court of Justice* (Oxford, 1999), p. 411.

⁵⁵³ Emphasis added. The use of the verb "avoid" echoed para. 47 of *Delimitis*.

⁵⁵⁴ It is interesting to note Wouter Wils's view prior to *Masterfoods*. That author had defended the more cautious text in Art. 16(1) of the regulation proposal on the basis of the principles of judicial independence and access to courts (Wils, *supra* (2001), pp. 357-358).

⁵⁵⁵ See also Recital 22 Reg. 1/2003.

⁵⁵⁶ See in this regard Mottard, Partsch, Pittie and Struys, "Chronique semestrielle de droit communautaire", 120 JdT (2001) 809, p. 810; Blaise and Idot, *supra* (2002), p. 143. But see Paulis, *supra* (2001a), pp. 419-422,

“centralist” judgment not entirely in conformity with the decentralisation of EC competition law enforcement in the new era.⁵⁵⁷ Others have severely criticised the Commission’s “primacy” as a form of intellectual and bureaucratic arrogance.⁵⁵⁸

In reality, however, *Masterfoods* and the corresponding provision of Article 16 of Regulation 1/2003 make national courts subject not to the Commission’s authority, but rather to that of the Court of Justice which is the only judicial organ that can review Community acts in an authentic way in the Community through Article 234 EC.⁵⁵⁹ This approach relies on the fact that *Masterfoods* does not stipulate that national courts must always consider themselves positively bound by Commission decisions. In fact, the Court avoided using the positive term “binding” but rather followed the more negative expression that national courts “cannot take decisions running counter to that of the Commission”.⁵⁶⁰

A formal positive binding effect of Commission decisions exists therefore only in fields where the Commission has exclusive competence. This was the case with the old Articles 65 and 66 ECSC⁵⁶¹ and with Article 81(3) EC under the previous system of enforcement. It still continues to be the case with decisions withdrawing the benefit of a block exemption regulation under the present system of enforcement. In the latter case such a decision will indeed be positively binding on any subsequent court judgment. On the contrary, in a system of parallel competences, the courts should in principle be in a position to form their own view as to the application of the competition rules independently of administrative agencies.⁵⁶² Indeed, the Court essentially held in *Masterfoods* that a national

according to whom the principle of separation of powers applies only within the same legal order and cannot apply as such to the relationship between the Community legal order and national legal orders.

⁵⁵⁷ See B.J. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* (London/Sidney, 2001), p. 51.

⁵⁵⁸ See Green, “Practical Implications of Reform”, in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000), p. 37, who stresses that the duty of sincere co-operation of Art. 10 EC should apply not only in an one-sided way and that the Commission should pay due deference to judgments of national courts that may be the result of an exhaustive analysis, especially when the courts relied upon information or facts not known to the Commission. See also Toffoletti, *supra* (2002), pp. 434/I-435/I.

⁵⁵⁹ See former Director General Schaub, *supra* (2002a), p. 13; Paulis and Gauer, *supra* (2003), p. 69. These authors retreat from the earlier position of Paulis (*supra* (2001a), p. 420), which was expressed more in terms of a Commission primacy.

⁵⁶⁰ *Masterfoods*, *op.cit.*, paras. 51-52.

⁵⁶¹ Thus, in case C-128/92, *H.J. Banks & Co. Ltd. v. British Coal Corporation*, [1994] ECR I-1209, para. 23, the Court held that Commission decisions based on Arts 65 and 66(7) ECSC, which lacked direct effect and could only be enforced by the Commission, were “binding on the national courts”.

⁵⁶² This distinction between positive effect of Commission exemption decisions and negative effect of Commission applicability or inapplicability decisions might lie behind the rather unfortunate Order of the CFI in a recent case. See case T-28/02, *First Data Corp., FDR Ltd, and First Data Merchant Services Corp. v. Commission*, Order of 17 October 2005, paras. 49-50: “When national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission ... However, negative clearance does not bind the national courts, even if it constitutes a fact

court is not bound by a Commission decision which is being attacked before the Community Courts,⁵⁶³ but may decide to stay proceedings pending a final ruling in Luxembourg, "unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted". In other words, the Court did acknowledge that at the very end of the day, national courts could not, strictly speaking, be bound by a Commission decision directly,⁵⁶⁴ but only indirectly through intervention by the Court of Justice, to which they could always have access by means of the preliminary reference procedure. As a Community judge stresses extrajudicially,

"Community law is interpreted and applied by the Court of Justice. It does not follow from this principle that the Commission is infallible. Whether or not an administrative decision of the Commission must be followed as embodying superior law depends not on the fact that the Commission has adopted it, so much as upon the fact that it has been upheld as valid by the Court of Justice".⁵⁶⁵

Thus, in principle the Commission's decisions should not be treated as positively binding. Instead, the supranational nature of the Community legal system requires that national courts should not compromise the supremacy and uniformity of Community law by taking decisions which are incompatible with those adopted by the Commission. This negative duty of abstention means that the courts should always seize the Court of Justice if they intend to contradict the Commission.

This also means that Commission decisions retain this indirect-negative binding force over national proceedings, so long as the material factual circumstances have not changed in the meantime. Otherwise, the national courts can always depart from the Commission's

which national courts may take into account in their assessment. It is apparent from Article 2 of Regulation No 17 that negative clearance means only, for the Commission, on the basis of the facts in its possession, that there is no need to intervene. Negative clearance does not therefore constitute a definitive assessment, nor in particular the adoption of a position which falls within the exclusive competence of the Commission. As Article 81(1) EC is directly applicable, as the Court of Justice has held on various occasions, it follows that individuals may rely on it before national courts and derive from it rights and, as national courts may also have other information on the particular circumstances of the case, they are naturally bound to reach their own opinion, on the basis of the information in their possession, on the applicability of Article 81(1) EC to certain agreements". It is true that this language rests upon the proviso that the national court may have other information on the particular circumstances of the case that were not available to the Commission, but still there is some difficulty to reconcile it with the rationale of Art. 10 EC and with the clear principle enunciated by the ECJ in *Masterfoods* which, after all, does not make any distinction between Art. 81(3) or 81(1) EC decisions and between applicability or inapplicability decisions.

⁵⁶³ According to the Court, it is immaterial in this context whether the Commission decision has been suspended by the Community Courts. Acts of Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn (*Masterfoods*, *op.cit.*, para. 53).

⁵⁶⁴ See in this sense O'Keeffe, "First among Equals: The Commission and the National Courts as Enforcers of EC Competition Law", 26 ELRev. 301 (2001), p. 304.

⁵⁶⁵ See Cooke, *supra* (2001b), p. 19.

pronouncements and reach a different conclusion. In such cases, the courts would not act disrespectfully to Articles 10 or 85 EC, therefore the *Masterfoods* principles should not apply. Indeed, the national courts should not even feel obliged to seize the Court of Justice with a preliminary reference only because of the existence of the earlier Commission decision, unless a new and genuine concern arose that necessitated the Court's intervention.⁵⁶⁶

This line of argument leads to the conclusion that decisions of *national* competition authorities cannot, as a matter of existing Community law, bind national civil courts, even when those authorities act in the framework of Community competition law under Regulation 1/2003.

First of all, these authorities cannot be considered as "Community organs" under Article 10 EC.⁵⁶⁷ Article 10 EC cannot cover the co-operation between national competition authorities and national courts, although it might be tempting at first sight to argue so, in order to establish a "horizontal" duty of co-operation, as between competition authorities and courts of different Member States.⁵⁶⁸ Arguments in favour seem to confuse the theory of *dédoulement fonctionnel*⁵⁶⁹ with the ambit of Article 10 EC, which uses an organic criterion in order to arrive at a functionalist result. In other words, it would not make sense to use Article 10 EC in order to impose duties on national courts or authorities vis-à-vis other national courts or authorities. This is because both the national competition authority and the national court are indeed respectively "indirect Community administration and judge", so Article 10 EC could not resolve disputes as between two organs at the same level of the Community supranational structure (*both* in this case being *organically national* but *functionally Community* organs).

Second, a national competition authority does not have a central role in defining or implementing the EC competition policy, as the Commission does under Article 85 EC,

⁵⁶⁶ The situation is different for constitutive decisions falling under the Commission's exclusive competence. In the new system of enforcement a Commission decision withdrawing the benefit of a block exemption would be always positively binding on national courts even if the facts have changed. See further below.

⁵⁶⁷ With regard to national courts, compare AG Léger's Opinion in *Köbler*, *op.cit.*, para. 66. According to AG Léger, the expression *juges communautaires de droit commun* "must not be understood literally, but symbolically: where a national court is called upon to apply Community law, it is in its capacity as an organ of a Member State, and not as a Community organ, as a result of dual functions".

⁵⁶⁸ Some commentators doubt whether an EC regulation can enter into such internal national procedural law questions. See in this regard, Gröning, *supra* (2001b), p. 89. See also Lenaerts and Gerard, *supra* (2004), p. 325, according to whom "the design of the relationships between national courts and their national competition authority resorts exclusively to national law".

⁵⁶⁹ See *supra*.

therefore one of the most important rationales behind *Masterfoods* cannot be transposed to cover this case.

Third, national authorities are not subject to the review of the Community Courts, so the argument of the primacy of the European Court of Justice, referred to above, is not transposable to this case, since a national court could never request a preliminary ruling from Luxembourg on the validity of a national act.⁵⁷⁰

Notwithstanding the fact that Community law itself does not impose duties on national courts to respect or not to contradict national competition authorities' decisions, such a duty may yet be prescribed by national law. First of all, when the court and the competition authority belong to the same legal order, then national law may contain specific rules about this relationship.⁵⁷¹ As mentioned above, the new generation of national competition laws that were enacted after modernisation provide for quite interesting solutions in that respect. Thus, the recently amended German Competition Act confers all decisions of national competition authorities within the EU a binding effect on German civil proceedings but this rule is confined to follow-on civil litigation, basically aiming at facilitating damages claims against convicted cartellists.⁵⁷² The same is true of English law, which is less revolutionary than German law since it applies only to Commission, OFT and CAT decisions.⁵⁷³ Finally, secondary Community legislation may opt to establish such an EU-wide binding effect of national competition authority decisions. Indeed, this remains an option in the Commission's Green Paper on damages.⁵⁷⁴

cc. The Concept of "Conflict" between Commission Administrative Proceedings and National Civil Proceedings

Article 16 of Regulation 1/2003, while containing a rule on the avoidance and resolution of conflicts between Commission and national court proceedings, does not define the notion of "conflict". It is at first sight not entirely clear whether the conflict refers to the incompatibility between the operative part of a Commission decision and the result reached

⁵⁷⁰ The national court could conceivably request a preliminary ruling on the interpretation of EC competition law, as applied by the NCA in question, but this does not change the reality that the rationale behind *Masterfoods* and Art. 16(1) Reg. 1/2003 is not present here.

⁵⁷¹ See e.g. Art. 18 of the Greek Competition Act which provides that the judgments of the administrative courts reviewing the Competition Committee decisions – but not the decisions themselves – have the force of *erga omnes res judicata* before the civil courts.

⁵⁷² S. 33(4) GWB (7. Novelle). See further above.

⁵⁷³ S. 58A of the UK Competition Act, as subsequently amended. See further above.

⁵⁷⁴ Option 8 *in fine* of the Green Paper.

by a national judgment, or whether it also extends to the reasoning of the two instruments. In the former case, a conflict would essentially take place only if the object and facts of the case before the Commission and those before the national court were *identical* and the operative parts of the Commission decision and of the national court judgment were incompatible with each other. In the latter case, a conflict would always ensue when the facts were *similar* and there was also inconsistency of reasoning as between the Commission and the national court. In order to take a position on this debate, it is, firstly, important to examine the legal nature of Commission decisions. Such decisions should be viewed in their proper context of administrative-public proceedings before a public authority which has extensive investigative and decisional powers and applies these powers vertically, acting as an emanation of the state. Because of this fundamental difference between vertical public-administrative proceedings and horizontal civil proceedings between private litigants, decisions by a public authority such as the Commission do not, formally speaking, produce a *res judicata* or issue estoppel effect.⁵⁷⁵ These are both legal concepts pertaining to civil litigation and aim at protecting certain fundamental legal values like legal certainty and finality of judgments.⁵⁷⁶ Therefore, a conflict in the present sense cannot be viewed as narrowly as it is seen in civil litigation. There, a conflict presupposes identity of object and litigants. Such a narrow concept, however, is not appropriate when examining the effects of Commission decisions in the competition field.

This means that a Commission decision that deals with a particular anti-competitive conduct may be in conflict with a civil judgment dealing with that same conduct, even when, the persons affected by that decision are not identical with the litigants in the national civil proceedings. A recent judgment of the Brussels Court of Appeal exemplifies this point. The Belgian court held that it had to pay deference, under Article 16 of Regulation 1/2003, to an infringement Decision by the Commission which had considered as anti-competitive a rule of the Belgian Architects Association providing for a scale of recommended minimum fees. The court rightly considered that it was bound to follow the Commission, since the latter had dealt

⁵⁷⁵ See in this sense also Nazzini, *supra* (2004b), pp. 112-113, with references to common law. In continental legal doctrine, which is an appropriate source to guide us because Commission proceedings follow the continental model of public administrative proceedings, decisions by administrative authorities do not produce *res judicata* but rather enjoy a "presumption of legality". The Commission has, however, on occasions referred to findings in its decisions as producing "*res judicata*". See e.g. Commission Decision 2005/480/EC of 30 April 2004 (*Compagnie Maritime Belge SA*), OJ [2005] L 171/28, para. 11. This is also the case with some commentators who express themselves in terms of *res judicata*. See e.g. M. Fallon, *Droit matériel général de l'Union européenne* (Louvain-la-Neuve, 2002), p. 329. Such an approach is not technically correct.

⁵⁷⁶ *Res judicata* and issue estoppel are slightly different notions, in that the former refers only to the dispositive part of a judgment and not the reasoning, while the latter extends also to the reasoning. The former is followed usually in continental and the latter in common law systems.

with the legality of exactly the same professional rule as was at stake in the national action. The fact that the complainants in the Commission case were not litigants in the national proceedings was, naturally, immaterial, although this fact would have been critical in the context of multiple civil proceedings.⁵⁷⁷

The conclusion, therefore, is that the concept of conflict is not here dependent on the identity or otherwise of the parties concerned but rather on the facts of the Commission's decision. Yet, this does not give us an answer as to the debate described above on whether *Masterfoods* and Article 16 of Regulation 1/2003 stipulate a duty for national courts to pay deference to Commission decisions of *identical* or *similar* facts. In order to give an answer to this question, one would have to delve again into the rationale of *Masterfoods* and Article 16.

As analysed above, the basic rationale is the principles of supremacy and effective and uniform application of Community law. The duty for national courts not to take decisions running counter to those of the Commission must not be seen as an indication of primacy of an antitrust authority over civil courts but rather as a duty of national organs, here the national courts, to pay respect to a Community institution, the Commission, always under the final control of the Court of Justice. At the same time, this rationale cannot be stretched too much in favour of the Commission because national courts too are Community courts of general jurisdiction under the supreme authority of the Court of Justice. To impose on them a wide duty of deference to Commission decisions dealing with similar facts, would decrease their role in the decentralised application of Community law and might turn them to secondary organs dealing with the uninteresting and unimportant details rather than with the core issues. While there is truth in the view that in the decentralised system of enforcement, consistency of reasoning counts more than consistency of decisions,⁵⁷⁸ a system of parallel competences relies also on some degree of healthy experimentation.

Following the more minimalist view as to the concept of conflict, seems to be in harmony with the very specific circumstances of *Masterfoods*, where the Irish court clearly wished to depart from a specific Commission Decision dealing with the same facts.⁵⁷⁹ Indeed, Advocate General Cosmas in *Masterfoods* viewed the concept of conflict between a Commission decision and national court proceedings narrowly:

⁵⁷⁷ See Cour d'appel de Bruxelles, 28-9-04, *Eddy Lodiso v. La SPRLU M.O.N.D.E.*, in: http://europa.eu.int/comm/competition/antitrust/national_courts and Commission Decision of 24 June 2004 (*PO: Barème d'honoraires de l'Ordre des Architectes belges*).

⁵⁷⁸ See Jenny, *supra* (2001), pp. 365-366.

⁵⁷⁹ See above.

“In order to establish such a form of conflict, a connection between the legal problem which arises before the national courts and that being examined by the Commission is not in itself sufficient. Nor is the similarity of the legal problem where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts. The Commission’s decision may provide important indications as to the appropriate way to interpret Articles [81(1) and 82], but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions. Such a risk only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the Commission’s decision. Consequently the limits of the binding authority of the decision of the national court and the content of the Commission’s decision must be examined every time.”⁵⁸⁰

Besides, it is not clear why the judge should pay deference to a Commission decision that is addressed in the Article 249 EC sense to persons different from the litigants. It is also noteworthy that the Commission views the conflict in its narrower sense, being prudent in this very sensitive field.⁵⁸¹

The debate between the minimalist-narrow and maximalist-broad reading of the concept of conflict and of the corresponding duty of national courts not to contradict Commission decisions is best personified in the latest UK episodes of the *Courage v. Crehan* saga.

In *Crehan v. Innpreneur*,⁵⁸² a case decided on appeal from the High Court,⁵⁸³ the English Court of Appeal was confronted with the effect that past Commission decisions had on a civil

⁵⁸⁰ *Masterfoods, op.cit.*, AG’s Opinion, para. 16. Compare also cases T-125/97 and T-127/97, *The Coca-Cola Company and Coca-Cola Enterprises Inc. v. Commission*, [2000] ECR II-1733, para. 85: “The possibility that a national court applying Article [82] of the Treaty directly in the light of the decision-making practice of the Commission might reach the same finding that CCSB holds a dominant position [does not] mean that the contested finding has binding legal effects. A national court which has to assess action taken by CCSB after the contested decision in the context of a dispute between CCSB and a third party is *not bound by previous findings of the Commission*. There is nothing to prevent it from concluding that CCSB is no longer in a dominant position, contrary to the Commission’s finding at the time when the contested decision was adopted.” This case concerned a merger clearance decision which in its reasoning included a finding of dominance. Although the merger was cleared, the addressee of that decision had sought to challenge that finding, arguing that this might be used to its detriment in national civil litigation.

⁵⁸¹ According to para. 8 of the co-operation Notice, “the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules *in the same case* in parallel with or subsequent to the Commission” (emphasis added). The same view is expressed in the Commission’s article-by-article Explanatory Memorandum to the draft regulation, under Art. 16, “the potential for conflict depends on the operative part of the Commission decision and the facts on which it is based” (emphasis added).

⁵⁸² *Bernard Crehan v. Innpreneur Pub Co. CPC* (CA), [2004] EWCA Civ 637, [2004] EuLR 693.

⁵⁸³ *Crehan v. Innpreneur Pub Company et al.* (Ch.D), [2003] EWHC 1510, [2003] EuLR 663.

case where the facts were similar.⁵⁸⁴ The Commission in its past decisions, which were considered to be relevant to the facts of the civil case at hand, had found that the lease agreements between certain beer suppliers and pub tenants affected trade between Member States and that the restrictive effect of the cumulative networks and other factors contributed to the foreclosure of the UK on-trade beer market. The significant contribution made by those specific networks to that restrictive effect meant that the exclusive purchasing and non-competition obligations of the leases fell foul of Article 81(1) EC.⁵⁸⁵ In *Crehan* the English courts had to identify whether the cumulative effect of several similar networks of beer distribution agreements foreclosed the UK market. The Court of Appeal reversed the High Court findings that a beer tie imposed on a pub tenant had not infringed Article 81 EC and held that the High Court judge should have followed the European Commission's findings in the similar cases referred to above. It was the first time that the English Court of Appeal had awarded damages for breach of competition law.

The Court of Appeal held that since the beer supplier in the case at hand, *Inntrepreneur*, was not a party to the Commission proceedings which resulted in those decisions, "it [was] not in dispute that those decisions did not formally bind anyone not addressed by those decisions".⁵⁸⁶ However, the Court of Appeal took issue with the High Court's departure from the Commission decision findings and its giving more weight to the evidence presented by the defendant. The court felt "uneasy by the judge's approach to the evidence".⁵⁸⁷ Since a comprehensive investigation and evaluation of a complex economic situation needed to be conducted and courts could not possibly embark on a detailed research investigation themselves, the Commission and other specialised antitrust authorities' exhaustive investigations should, according to the court, be given proper deference. The court then proceeded to rely upon Articles 3(1)(g) and 10 EC and *Masterfoods*, as well as upon the 1993 co-operation Notice and the principle of legal certainty, to arrive at a general principle of deference owed to Commission decisions, even if there is no conflict as such between the operative parts of the Commission decisions and the national court's judgment and the parties

⁵⁸⁴ These were: Commission Decision 99/230/EC of 24 February 1999 (*Whitbread*), OJ [1999] L 88/26; Commission Decision 1999/473/EC of 16 June 1999 (*Bass*), OJ [1999] L 186/1; Commission Decision 99/474/EC of 16 June 1999 (*Scottish and Newcastle*), OJ [1999] L 186/28.

⁵⁸⁵ Notwithstanding this finding, the Commission proceeded to exempt the notified agreements in all three cases concerned.

⁵⁸⁶ *Ibid*, para. 74.

⁵⁸⁷ *Ibid*, para. 76.

in the proceedings are not identical.⁵⁸⁸ The Court of Appeal held that “the English court was obliged under the duty of sincere co-operation to give to the Commission much greater deference than that which the judge, with all respect to him, was prepared to give”.⁵⁸⁹

This was not, however, the last episode and the House of Lords very recently overturned the Court of Appeal and found that the High Court judgment should be restored. The House of Lords referred to the Community case law on conflicts between decisions of the Commission and national courts and followed the narrower concept of conflict, referring to the Opinion of Advocate General Cosmas in *Masterfoods*.⁵⁹⁰ It held therefore that there was no conflict between the Commission Decision in *Whitbread* and the High Court’s finding that the Inntrepreneur agreements did not infringe Article 81(1) EC. According to the House of Lords, whilst the court should respect the Commission’s expert analysis, Commission decisions are ultimately only part of the admissible evidence which the court must take into account. The House of Lords also noted that the Court of Appeal did not comment on the Judge’s analysis of the facts as it considered this was an approach he should never have adopted in the first place.

This approach deserves approval. While the Court of Appeal also clearly preferred the narrower view in the assessment of what constitutes a conflict between a Commission decision and a national court’s judgment, it was nevertheless ready to accord full deference to the findings of past Commission decisions. This was because of the Commission’s expertise and, more importantly, because of the principles of loyal co-operation and effectiveness, supremacy and uniformity of Community law.⁵⁹¹

The Court of Appeal’s approach may seem Community-friendlier than the one of the House of Lords, but a closer analysis shows that it is problematic. First, because it is based more on policy than on clear principles of law.⁵⁹² A duty to pay deference can only be based on Article 10 EC (*lex generalis*) or Article 16(1) of Regulation 1/2003 (*lex specialis*). Yet it is clear that these two provisions, as indeed interpreted in *Masterfoods*, do not extend as far as

⁵⁸⁸ *Ibid*, paras. 79 to 94. The court also referred to precedents such as *Hasselblad*, *MTV Europe* and *Iberian* (*op.cit.*) where English courts had expressed the view that Commission decisions should be given deference. See on this question above.

⁵⁸⁹ *Ibid*, para. 97.

⁵⁹⁰ *Inntrepreneur Pub Company (CPC) et al. v. Crehan* (HL), [2006] UKHL 38, in particular para. 49 *et seq.* of Lord Hoffmann’s speech.

⁵⁹¹ For a positive assessment of the *Crehan* judgment of the Court of Appeal, see Nazzini and Andenas, “Awarding Damages for Breach of Competition Law in English Courts – *Crehan* in the Court of Appeal”, 17 EBLR 1191 (2006), p. 1197.

⁵⁹² See Nazzini and Andenas, *supra* (2006), p. 1201, who admit that the “judgment of the Court of Appeal is based on policy considerations in the framework of Article 10 EC rather than the application of established principles and doctrines of Community or national law”.

the Court of Appeal may have wished. Second, even from a policy point of view, introducing a principle of deference to the Commission because of its undisputed expertise in the field of EC competition law, would result in a principle of primacy of public over private enforcement. In a system of parallel competences, the *juges communautaires de droit commun* must however be given full competence - and indeed full responsibility - to apply materially the Treaty competition rules on a par with the Commission. Turning them to mere assessors of damages would not in the long term be beneficial to the establishment of an emancipated system of private antitrust enforcement in Europe.

dd. Resolution of Conflicts

Bearing these principles in mind, we proceed below to five scenarios as to the resolution of conflicts between Commission and national court proceedings.⁵⁹³

i. First Scenario: Pending National Court Proceedings and Envisaged or Final Commission Decision

If the Commission has initiated a procedure or if it has, *a fortiori*, adopted a final decision, national courts are not devoid of their competence to deal with the same facts, since their function is different from that of the Commission.⁵⁹⁴

However, according to Article 16(1) of Regulation 1/2003 and to the *Masterfoods* principles, in the first case (initiated Commission procedure) the national court must “avoid giving decisions” conflicting with the decision contemplated by the Commission⁵⁹⁵ while in the second case (Commission decision) it “cannot take” decisions running counter to the already existing decision. In the first of these two cases, the national court will most likely be informed by one of the litigants of the Commission proceedings. If, however, the court wants to formally ascertain whether the Commission has initiated proceedings and contemplates a decision, it may so ask the Commission.⁵⁹⁶ The national court’s best practice should then be

⁵⁹³ See already para. 102 of the *White Paper*.

⁵⁹⁴ As the Commission co-operation Notice stresses (para. 11, fn. 29), if the Commission has initiated a procedure, a national court would be prevented from applying Arts. 81 and 82 EC, only in case the national court acts as “national competition authority” in the sense of Arts. 11(6) and 35 Reg. 1/2003 (for example, this is the case of Ireland). In that case, the national court makes part of national *public*, rather than of *private* enforcement.

⁵⁹⁵ See also case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, [2004] ECR I-5039, para. 19.

⁵⁹⁶ The Commission promises in para. 12 of the co-operation Notice to give priority to such cases.

to stay proceedings in order for the Commission to reach its final decision. If the court takes this step, the possibility of conflicts between the Commission and itself is excluded, since, once it resumes proceedings, it would be bound not to give judgment running counter to the Commission decision which it had awaited during the suspension period. However, as paragraph 12 of the co-operation Notice recognises, “where the national court cannot reasonably doubt the Commission’s contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ... await the Commission’s decision”.

As stressed above, the supremacy rule of Article 16(1) of Regulation 1/2003 serves well the fundamental requirements of uniformity of the application of Community law and legal certainty.⁵⁹⁷ Thus, national courts cannot consider invalid Community acts, but must refer this question to the Court, which is the sole judge that can declare the invalidity of such acts. Of course, a preliminary reference will be possible within the limits of the *TWD Textilwerke* jurisprudence of the Court of Justice,⁵⁹⁸ which has established that parties that fail to challenge a Commission decision under Article 230 EC, cannot later circumvent that provision and challenge the same decision through a preliminary reference under Article 234 EC. It will have to be judged on an *ad hoc* basis whether the preliminary reference conceals a circumvention of Article 230 EC.

The deference required from national courts covers all kinds of decisions, not only applicability decisions which declare a practice to be prohibited by Articles 81 or 82 EC, but also inapplicability or “positive” decisions which declare the innocuousness of a certain practice, either because it does not fall under Article 81(1) EC, or because it does but fulfils the conditions of Article 81(3) EC, or because it is not caught by Article 82 EC.⁵⁹⁹

⁵⁹⁷ Compare *Foto-Frost, op.cit.*, para. 15: “that requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty”.

⁵⁹⁸ Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Germany*, [1994] ECR I-833, paras. 17, 18, 24-26. Compare, however, joined cases C-346/03 and C-529/03, *Giuseppe Atzeni et al. v. Regione autonoma della Sardegna*, [2006] ECR I-1875, paras. 30-34, where the *TWD* principles were read somewhat narrowly by the ECJ.

⁵⁹⁹ See Schaub, “Panel One Discussion: Compatibility, Efficiency, Legal Security”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 35; Paulis, *supra* (2001a), p. 424. See, however, Schütz, “VO 1/2003”, in: Müller-Henneberg, Schwartz & Hootz (Eds.), *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht, Gemeinschaftskommentar, 9. Lieferung* (Köln/Berlin/München, 2004), para. 9 under Art. 10, with references to different views.

There is no possibility for a national court to depart from a Commission decision, unless an action for annulment of the decision is pending before the Court of First Instance or unless the national court decides to address a preliminary reference on the validity of this decision to the Court of Justice.⁶⁰⁰ In both cases the national court would have to stay proceedings, possibly granting interim measures.⁶⁰¹

However, it seems possible for the national court to depart from the Commission's decision, if the facts of the case have changed materially or if the Commission decision has been qualified or overruled in its substance by subsequent jurisprudence of the Community Courts.⁶⁰² In such a case, the Commission decision itself will not have been annulled, but its substance will have been superseded, therefore a judgment of a national court that would depart from it and, at the same time, follow the line of reasoning of the subsequent Community Court judgment, would not violate Article 16(1) of Regulation 1/2003. If we ascribe to *Masterfoods* and to the corresponding provision of Article 16(1) the meaning that national courts are not subjected to the authority of the Commission but rather to that of the Court of Justice, then, if there is already a Community Court judgment that supersedes the substance of the Commission decision, the national court can depart from the latter and follow the former. Indeed, the national court would not be bound to stay proceedings and address a preliminary judgment to the Court, although it could well do so, if it chose. In all these cases, the national court, of course, will not declare the invalidity of the superseded Community act, indeed it cannot do so. Instead, it will merely decide not to give deference to that act but rather follow the Community Courts' new interpretation or explain in the reasoning of its judgment why the facts have materially changed to render the Commission's decision obsolete.

The situation would have been different and a reference to the Court of Justice would have been obligatory, if the Commission decision had constitutive nature and the Commission enjoyed exclusive competence, as was the case with exemption Decisions under the old system. In such cases, the constitutive nature of the Commission decision, notwithstanding

⁶⁰⁰ See Schaub, "Panel One Discussion: Compatibility, Efficiency, Legal Security", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 35; Hirsch, *supra* (2003), p. 249.

⁶⁰¹ Under national law it may not be possible for the court to order interim measures *ex officio*. For example, this was - until the recent adoption of Decreto-Legge 223/2006 - the case in Italy. However, the problem was more theoretical than practical, since in most cases one of the litigants would make an application to the court.

⁶⁰² See in this sense Schaub, "Panel One Discussion: Compatibility, Efficiency, Legal Security", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 35; Paulis, *supra* (2001a), p. 423; Venit, *supra* (2003), p. 560. Regrettably, the co-operation Notice remains silent on this point.

the fact that in its substance the decision is qualified or superseded by subsequent jurisprudence, means that the national court would have no other option but to seize the Court of Justice under Article 234 EC with a preliminary reference on the validity of that decision.⁶⁰³

ii. Second Scenario: Non-final National Court Judgment and Envisaged Commission Decision

If the national proceedings have already resulted in a judgment which is not yet final, either because it is still open to appeal or because appeal is pending, there is not as yet a *res judicata* effect and the Commission may at any time adopt a contrary decision, which the national court of appeal would be bound to avoid contradicting, further to Article 16(1) of Regulation 1/2003. The power of the Commission to adopt a decision, notwithstanding the existence of an earlier judgment of a national court, is an autonomous power that the Commission enjoys based on the Treaty.⁶⁰⁴ The Court of Justice has stressed this in *Masterfoods*, relying basically on Article 85 EC.⁶⁰⁵

However, this power of the Commission is not entirely unqualified. The Commission is also bound by the principle of sincere co-operation of Article 10 EC, which means that it would be entitled to intervene in rather exceptional circumstances that pertain to the Community interest and raise serious policy interests.⁶⁰⁶ Such exceptional circumstances would be present, if various national courts and competition authorities are dealing with parallel cases raising similar issues to those in the case at issue and the Commission decision is necessary in order to ensure that the Community competition rules are applied coherently throughout the Community.⁶⁰⁷ The undue intervention of the Commission would in fact create more

⁶⁰³ Compare case C-461/03, *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit*, [2005] ECR I-513, paras. 18-25, where the ECJ stressed that national courts must always seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a Community act even where the Court has already declared invalid analogous provisions of another comparable act, notwithstanding the *CILFIT* jurisprudence. This ruling does not, however, contradict our argumentation above that national courts are not bound by superseded Commission decisions. The question that we dealt with above is the effects of such decisions on national judges and not whether national judges can declare their invalidity, which, as we stressed, they cannot declare.

⁶⁰⁴ See Burrichter, *supra* (2001), p. 542; Gröning, *supra* (2001a), p. 585.

⁶⁰⁵ *Masterfoods*, *op.cit.*, para. 46; *Van den Bergh Foods*, *op.cit.*, paras. 197-199.

⁶⁰⁶ See in this sense Kjolbye, 39 CMLRev. 175 (2002), p. 178, mentioning the facts of the *Irish ice cream* case as indicative of such a policy issue that would justify the Commission's intervention. There, the Commission considered that there was a sufficient Community interest in taking a decision differing from a judgment delivered by a national court: settling fundamental questions about business practices which are found throughout the Community (*Van den Bergh Foods Decision*, *op.cit.*, para. 279).

⁶⁰⁷ *Van den Bergh Foods*, *op.cit.*, para. 198.

problems and would risk antagonising the *juges communautaires de droit commun* with negative repercussions for decentralisation. At this point, one may draw parallels from the more co-operative atmosphere of the relationship between national courts and the European Court of Justice, whose approach towards the national judges has always been one of persuasion rather than constriction, with the positive results being more long-term than short-term. The Commission should follow the same approach and use the good measure.⁶⁰⁸

A question arises as to whether the Commission would still be able to open proceedings and adopt a decision in order to "pre-empt" the national court of appeal, also in cases where the Commission has already made its position clear before the first instance court.⁶⁰⁹ This may have happened either pursuant to Article 15(3) of Regulation 1/2003, through an *amicus curiae* intervention by the Commission itself or by the national competition authority acting as agent for the former or pursuant to Article 15(1) of the Regulation, through an opinion on questions concerning the application of the Community competition rules addressed to that court in response to a request by the court. Our view is that while in practice it would be very unlikely for the Commission to adopt a decision in such cases,⁶¹⁰ in law, it would still be

⁶⁰⁸ See Cooke, *supra* (2001b), pp. 19-20, who submits that "if the Commission believes in subsidiarity and decentralised administration of the competition rules, then it should accept the logic of its proposal and live with the results, even if from time to time that may mean having to live with some decisions it would rather not have". The same author goes on to stress that fallibility of national courts in individual cases is the price of the reform which the Commission should live with.

⁶⁰⁹ See further Cooke, *supra* (2001a), p. 559, who also argues that a Commission decision, subsequent to a national court judgment, would be less justified, even when the Commission did not intervene as *amicus curiae* but was informed of the first instance judgment (pursuant to Art. 15(2) Reg. 1/2003) by the Member State in question, without exercising its power to intervene in the appeal proceedings. These views must be seen in the time context before the September 2000 regulation proposal which proposed a duty to notify the Commission only of *final judgments* where the EC competition rules *have been applied*, and not of national *proceedings* where these rules *are being invoked*. In any case, it can be counter-argued that the right to appeal against a judgment can only be exercised by the litigants, therefore, one cannot exclude that the losing party does not file an appeal. In such a case, the serious competition law issue that has arisen can only be addressed by the Commission in a subsequent decision.

⁶¹⁰ Compare the Commission's approach in the *Irish ice cream* case. There, the Commission adopted a prohibition Decision, although the Irish High Court had earlier decided otherwise. See *Van den Bergh Foods* Decision, *op.cit.*, in particular para. 279, where the Commission stressed that the Irish court had considered the option of contacting the Commission, as well as the possibility of referring a preliminary question to the ECJ prior to giving judgment. However, as the Commission put it, "the High Court did not find either of these options necessary for it to give judgment". Thus, it follows, the Commission was entitled to adopt itself a decision because of the existing Community interest "in settling fundamental questions about business practices which are found throughout the Community". This, therefore, implies that the Commission would not have intervened, had the Irish court been prudent enough to seize the Commission or the ECJ before rendering its judgment. Compare the provision of para. 57 of the ECN co-operation Notice which deals with an equivalent situation: "The Commission will normally not - and to the extent that Community interest is not at stake - adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation". Of course, the difference here is that in the relationship between the Commission and national courts there is no equivalent to the Art. 11(6) Reg. 1/2003 mechanism.

perfectly entitled to do this, as long as the Community interest dictated so.⁶¹¹ As the *Masterfoods* principles make clear, the Commission is entitled to adopt decisions at all times.⁶¹²

More sensitive would be for the Commission to adopt a decision subsequent to a national judgment, when the national court has sought a preliminary ruling from the Court of Justice. In such case, it is again hardly arguable that the Commission is impeded in adopting a subsequent decision, although certainly in practice such an action is highly unlikely. However, in law, the Commission can still proceed to the adoption of a decision which, nevertheless, would have to be compatible with the Court of Justice's subsequent ruling in its substance otherwise it would be liable to be annulled.⁶¹³

iii. Third Scenario: Final National Court Judgment Finding Inapplicable the Competition Rules and Envisaged Applicability Commission Decision

If national courts have reached a final judgment of inapplicability of the EC competition provisions, a so-called "positive" judgment, the Commission may instead find that there is a violation of those provisions.⁶¹⁴ Indeed, such were the facts in *Masterfoods* and the ECJ unequivocally held that "the Commission is ... entitled to adopt at any time individual decisions under Articles [81 and 82] of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision". As we just saw, this conflict is rather easy to resolve if the pre-existing national court judgment is not final and is therefore still open to appeal or cassation. In that case, the higher court will be bound to respect the

⁶¹¹ See in this sense Kjolbye, 39 CMLRev. 175 (2002), pp. 179-180, according to whom the *amicus curiae* intervention and the power of the Commission to adopt a subsequent contrary position are two complementary mechanisms that pursue the same fundamental aim, namely the effective and consistent application of the law. The first, however, is preventive in nature, while the second is corrective. The fact that the Commission has already submitted an *amicus curiae* brief should not deprive it of its power to adopt a subsequent decision contradicting the national court's judgment in question. But see Cooke, *supra* (2001b), pp. 18-20, who identifies a problem of "fairness" with regard to the subsequent Commission decision.

⁶¹² See *contra* Cooke, *supra* (2001a), p. 559, who, writing before the September 2000 regulation proposal, appears far more deferential to the national courts' independence.

⁶¹³ Alternatively, the validity of a Commission decision that would depart from an earlier preliminary ruling of the ECJ could be submitted anew to the latter by means of another preliminary reference by the national court that adjudicates on appeal.

⁶¹⁴ A similar situation would arise if a national court has already applied a block exemption regulation to an agreement, thus considering it legal, while subsequently the Commission decides to withdraw the benefit of the block exemption from this agreement and the facts have not substantially changed since the time of the judgment. More complicated would be the situation, if an NCA has, subsequently to another Member State's court judgment, withdrawn the benefit of the block exemption in a distinct geographic market. See *supra*.

Commission's final or contemplated decision under the principles established in *Masterfoods* and Article 16(1) of Regulation 1/2003.

Problems arise when the national court's judgment is no longer open to review and thus produces *res judicata* and constitutes – what in continental jurisdictions is called – an enforceable title. The Commission has indicated that in such cases the *inter partes res judicata* effect of the national court's judgment should not be affected.⁶¹⁵ This means that the Commission will essentially prohibit the agreement or practice at issue with *erga omnes* effect for all other market players with the exception of the litigants.⁶¹⁶

With all due respect, we fail to comprehend the Commission's logic and its apparent deference to the principle of *res judicata*.⁶¹⁷ In particular, we wonder how the Commission's adoption of an applicability or "negative" decision can leave intact the *res judicata* effect of a judgment that finds lawful that same agreement or behaviour which is prohibited by the Commission's decision. The Commission's logic might work in cases of a network of vertical agreements where the national judgment becomes *res judicata* only as between the litigants and naturally does not bind the other contractual parties of the network. For example, in case of a distribution network, a national "positive" judgment would be *res judicata* as between the supplier and one of the distributors (*inter partes*), and the Commission would be able, if it wished, to prohibit all other agreements of the network with the exception of the specific one that gave rise to the national litigation.

On the other hand, the Commission's approach becomes less meaningful in cases of horizontal agreements or abuse of dominance. In such instances, it is unavoidable that the prevailing party in the national proceedings will also be one of the addressees of the Commission's prohibition decision. If the subsequent prohibition decision were to avoid infringing the *inter partes res judicata* effect of the national proceedings, then one wonders how much remains for the Commission to prohibit. When the Commission takes the dramatic step to proceed to a decision⁶¹⁸ which then under Article 249 EC is binding on its addressees, it would be totally immaterial if the latter have prevailed in national litigation, since they could never go on with the behaviour condemned by the Commission.

⁶¹⁵ Para. 102 of the White Paper.

⁶¹⁶ See Schaub and Dohms, *supra* (1999), p. 1068; Schaub, *supra* (2000a), p. 157.

⁶¹⁷ See also the critical comments by Cooke, *supra* (2001a), pp. 558-559; *idem*, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 505.

⁶¹⁸ As explained above, the Commission would decide to take up a case and produce a decision contradicting a national judgment only in very exceptional cases where the Community public interest requires. All the more so here, where we have a judgment that is no longer subject to appeal.

Therefore, one has to re-dimension the statements of the Commission with regard to the respect of the principle of *res judicata*. Such statements, we should stress, appear more as political declarations rather than as descriptions of the law. The Commission's position of deference can be seen as an attempt, firstly to appease the reactions of those who see decentralisation as centralisation and, thus, to enhance the possibilities of a positive reception of the new system at the national level, and secondly not to antagonise the national courts, which, being the *juges communautaires de droit commun*, are very sensitive to interventionist inroads by Community organs into their fields of competence.⁶¹⁹

In law, however, the principle of *res judicata* does not appear sacrosanct at closer scrutiny. Regulation 1/2003 contains no direct reference to the question of respect of the *res judicata* effect of national judgments and limits itself at establishing a rule of precedence in Article 16(1), which makes clear that national courts cannot contradict decisions adopted by the Commission. Neither does the Court of Justice make any reference to such a principle in its *Masterfoods* judgment. In that case the Court of Justice stressed the unqualified power of the Commission to adopt a decision even in contradiction to an earlier judgment of a national court.

The natural consequence of such a contradictory administrative decision of the Commission is that, while the national civil judgment technically still stands, its *res judicata* effect becomes nominal.⁶²⁰ This is so because, firstly, the winning party will not be practically able or willing to enforce such a judgment, because the substantive conduct involved would be incompatible with a prohibition decision by the Commission. For example, if an undertaking has been awarded damages by a national court but has then been found guilty of abuse of its dominant position by a subsequent Commission decision and the damages award is connected with its abusive behaviour, it will not be able to "consummate" its victory because that would constitute non-compliance with the decision.⁶²¹ Secondly, in eventual new civil proceedings

⁶¹⁹ Compare, for example, the national judiciary's reactions as to the recent *Köbler* judgment, where the ECJ established that Member States may be liable for violations of EC law by their supreme courts. See Wattel, "*Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This*", 41 CMLRev. 177 (2004). *A fortiori*, the intervention by the Commission, which is not a judicial organ, raises more objections at the national judiciary level. Reference is also made to the discussion above on the application of the principle of the separation of powers as between the Commission and national courts.

⁶²⁰ See Burrichter, *supra* (2001), p. 542, who argues that *res judicata* cannot bar the opening of an administrative procedure by the Commission. This is because the administrative procedure is justified by the public interest and the subject of the dispute is technically different from the one of the civil national proceedings. The author goes on to note, though without reasoning, that the Commission cannot impose fines in such situations. Presumably, the imposition of fines upon undertakings whose conduct has been considered legal by national courts, would raise serious concerns of legal certainty.

⁶²¹ For a rare case where the Commission decided to go ahead and move towards adopting a prohibition decision notwithstanding a contradictory national final judgment see the *Presflex/Lipski* case (see *Commission*

between the litigants, the court dealing anew with the case, would be bound to follow the Commission's decision pursuant to Article 16(1) of the new Regulation, thus not recognising the *res judicata* effect of the earlier judgment.

Until recently, the European Court of Justice had been rather reserved, if not evasive, to touch upon the principle of *res judicata* of national courts judgments and the eventual limitations of Community law. In *Köbler* however,⁶²² the Court held that the violation of Community law by a national supreme court may under certain circumstances engage the state liability of the Member State in question. The Court essentially rejected, albeit implicitly, the *res judicata* arguments on the basis that a claim for damages would not really invalidate a court judgment that had misapplied manifestly Community law.⁶²³ Rather such a claim would compensate the individuals that suffered damage as a result of the violation of Community law.⁶²⁴

More explicit was the Court's pronouncement in the recent *Kühne & Heitz* case,⁶²⁵ where it made clear that national principles echoing the *res judicata* rule cannot stand in the way of national courts' duties to give full effect to Community law and thus such principles recede before the principle of legality.⁶²⁶ Besides, it is rightly argued that legal certainty, which underlies the principle of *res judicata*, cannot in reality be created by a national supreme court's judgment, as far as questions of Community law are concerned, since it is only the Court of Justice that is the ultimate and authoritative interpreter of Community (including

Xth Report on Competition Policy - 1980 (Brussels/Luxembourg, 1981), para. 126, pp. 87-88). The facts were that an arbitral award had required the defendant to continue paying license fees pursuant to a patent licensing agreement after the expiry of the patents. The award was upheld by a judgment of the *Tribunal de première instance* of Brussels (Civ. Bruxelles, 15-10-75, *Preflex SA v. Lipski*, 91 JdT 493 (1976)). The court rejected an action to have the award set aside, because, after dealing with the EC competition issue, it concluded that no infringement had taken place. The Commission, however, held that this agreement, as interpreted by the arbitral award and upheld by the national court, was incompatible with the Treaty competition rules. It communicated its objections to the parties and in essence rejected the construction given by the arbitral tribunal and the national court to the problematic contractual clause. As a result, the parties complied with the Commission's views and reached a settlement, thus putting an end to the dispute. In this case the national court's judgment, though formally still final and valid, was essentially deprived of its practical effects. On this case in the context of arbitration, see below.

⁶²² *Köbler*, *op.cit.* For commentaries see Obwexer, 14 EuZW 726 (2003); Schwarzenegger, 44 ZfRV 236 (2003); Wattel, *supra* (2004), p. 177 *et seq.*; Pittie and Van Ypersele, "Contentieux communautaire", 12 JdT (Eur.) 236 (2004), pp. 239-240; Hoskins, "Suing the HL in Damages: Career Suicide or Community Law Right?", 9 *Judicial Review* 278 (2004); Drake, "State Liability under Community Law for Judicial Error: A False Dawn for the Effective Protection of the Individual's Community Rights", 11 *IJEL* 34 (2004).

⁶²³ *Köbler*, *op.cit.*, paras. 38-40.

⁶²⁴ See also Skouris, "Which Are the Consequences of the Violation of the Duty to Apply Community Law by National Supreme Courts?", 24 *RHDE* 251 (2004) [in Greek], pp. 254-255.

⁶²⁵ Case C-453/00, *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren*, [2004] ECR I-837. See on this case Pittie and Van Ypersele, *supra* (2004), p. 240.

⁶²⁶ The conflict was not resolved in too extreme a way, since the ECJ identified signs of discretionary power in the national organ concerned, thus inviting the latter to exercise that discretion in a manner in conformity with the full effect of Community law. See also Skouris, *supra* (2004b), p. 265.

competition) law.⁶²⁷ Therefore, the claim of legal certainty with regard to such national judgments cannot be as strong as the equivalent one with regard to an ECJ judgment.

The same question also arose - though only in theory and never in practice - under the previous system of enforcement, when a national court considered that certain conduct did not fall under Articles 81(1) or 82 EC, or that an agreement was covered by a directly applicable block exemption regulation, while the Commission subsequently, based on the same facts, reaching the opposite conclusion and prohibiting that conduct or withdrawing the benefit of the block exemption regulation.⁶²⁸ It had been argued that if the national judgment was final and no longer subject to appeal, thus constituting *res judicata*, the parties benefiting from the exemption could institute new proceedings, for example for restitution of damages paid. According to this line of argument, which is transposable to the new decentralised system of enforcement,⁶²⁹ the *res judicata* principle in this case could not pre-empt the precedence due to EC law.⁶³⁰

A further possibility that has been suggested as a remedy in such cases of conflict is the use of certain extraordinary means of recourse against final judgments that some legal systems provide for. Such a means of recourse can be the reopening of a contested judgment,⁶³¹ which may lead to the re-examination of a case, notwithstanding the final character of the contested judgment. Sometimes the appeal is aiming at the interest of establishing a correct legal precedent (*recours dans l'intérêt de la loi*).⁶³² The reopening of the proceedings will have as a result that the national court will now be bound by the Commission decision pursuant to Article 16(1) of Regulation 1/2003, always on the condition that the facts since the rendering of the Commission decision have not materially changed.

⁶²⁷ See A. Metaxas, *State Liability for Violations of Community Law by National Supreme Court Judgments* (Athens/Thessaloniki, 2005) [in Greek], p. 62.

⁶²⁸ A further possibility was for a judgment to consider Art. 81(1) EC non-applicable and for the Commission decision to consider that provision applicable to an agreement while also granting an individual exemption under Art. 81(3) EC. That would not be, however, a conflict in the *Masterfoods* sense since it would refer only to the reasoning and not to the operative parts.

⁶²⁹ Naturally, the new system makes the negative clearance and individual exemption decisions obsolete. Instead, the Commission will be taking applicability (negative) and inapplicability (positive) decisions.

⁶³⁰ See Marengo, *supra* (1994), pp. 619-620.

⁶³¹ *Requête civile* and *Wiederaufnahme des Verfahrens* in French and German law respectively. Greek law also provides for such an extraordinary means of recourse (*anapsilafisi*). See Ioannou, *supra* (1984), p. 447, who mentions the possibility of a reopening of the contested judgment in case a national court has applied a block exemption regulation and the Commission has subsequently withdrawn the benefit of the exemption accruing to the specific agreement.

⁶³² See the proposal by Bourgeois, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), p. 508.

The problem with the reopening of a contested judgment is that those national legal systems that provide for such an extraordinary remedy, usually subject it to very limited and restrictive conditions which generally are connected with situations where respect for *res judicata* conflicts with fundamental procedural principles, or where the judgment is erroneous in its merits and the error has been instigated by a criminal act, such as perjury, or where the judgment relied upon another judgment that was subsequently quashed.⁶³³ The latter situation may be comparable to the case where there is a subsequent Commission decision that is incompatible with the already existing court judgment. A Commission decision, though not constituting *res judicata* for civil proceedings, nevertheless binds its addressees and gives rise to negative duties of deference for the national courts pursuant to Article 16(1) of Regulation 1/2003. Therefore, through a wide interpretation of the national conditions for this extraordinary means of recourse, consistently to Community law,⁶³⁴ it is not excluded that this mechanism may be available in cases where a final court judgment is followed by a conflicting Commission decision.⁶³⁵

The question arises whether Community law may actually require such a result for reasons of effectiveness of Community law, even in the absence of this extraordinary means of recourse under national procedural law. Pursuant to the *Factortame I* line of cases it could be argued that under Article 10 EC a national court may be required to use its best endeavours in order to set aside a judgment that conflicts with a Commission decision if this conflict creates an intolerable situation for Community law.

Indeed, the *Kühne & Heitz* case rests upon these premises. There, national law provided for the opportunity for the public administration to review an administrative decision. This allowed the Court of Justice to dismiss arguments based on the principle of legal certainty and to stress the duty of the authorities under Article 10 EC to review their decisions in conformity with Community law.⁶³⁶ It could be argued that the same principle is transposable to the case of the extraordinary remedy of the reopening of a contested judgment. However, the Court of Justice recently in *Kapferer* rejected this approach and placed more emphasis on the principle of *res judicata*.⁶³⁷ The Court held that "Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even

⁶³³ This is generally the position adopted by Greek law. See further K.D. Kerameus, *Methods of Appeal* (Athens/Thessaloniki, 2002) [in Greek], p. 85 *et seq.*

⁶³⁴ Pursuant to the principle of consistent interpretation.

⁶³⁵ See Kamann and Horstkotte, *supra* (2001), p. 466, who speak of the possibility to use *by analogy* the *Wiederaufnahme des Verfahrens* means of recourse in Germany.

⁶³⁶ See further Gautier, 132 JDI (*Chunet*) 401 (2005), p. 403.

⁶³⁷ Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, [2006] ECR I-2585, para. 20.

if to do so would enable it to remedy an infringement of Community law by the decision at issue".⁶³⁸ This judgment, however, does not exclude that Community law may indeed impose a duty upon national courts to revisit their judgments, when such a possibility exists under national law. The Court clearly distinguished its *Kühne & Heitz* ruling, not only on the basis that the relevant body there was administrative and not judicial, but also because national law there allowed for that possibility, whereas in *Kapferer* it was not the case.⁶³⁹

A further question is whether, in case one of the parties does not comply with the national court's judgment, courts that are called upon to enforce the non-complied judgment, through a subpoena or other means of enforcement/execution, such as seizure, garnishment, attachment, periodic penalty payments (*astreintes*), etc., are bound by Articles 10 EC and 16(1) of Regulation 1/2003 to refuse to order the enforcement of the judgment. While such an interpretation might seem attractive at first sight, it would nevertheless go too far in interfering with national procedural autonomy. Besides, Article 16(1) of Regulation 1/2003 refers to national courts ruling "on agreements, decisions or practices under Article 81 or Article 82 of the Treaty". It is not obvious to us that national enforcement proceedings would fall under the rationale of that provision since, in reality, the courts in those cases are not *applying* the Treaty competition provisions as such, but rather aim at compliance by recalcitrant litigants.

It should further be mentioned that the recognition or enforcement of a national court judgment that has applied EC competition law in an erroneous way and has, thus, considered legal an anti-competitive conduct, which has later been prohibited by a Commission decision, may be against public policy in another EU Member State, according to Article 34(1) of Regulation 44/2001. The public policy exception has been interpreted in a very narrow manner by the European Court of Justice,⁶⁴⁰ but it should not be excluded that in exceptional circumstances the violation of EC competition law by a national court may qualify as an offence against public policy (*ordre public international*).⁶⁴¹

However, the violation of public policy, in such exceptional cases, will be the result of some fundamental error in the application of EC competition law by the judge and not of the inconsistency with the Commission decision itself. In other words, public policy in this sense has a substantive meaning and can be exceptionally violated only because the judgment allows a *prima facie* repugnant anti-competitive conduct. It does not have a "procedural"

⁶³⁸ *Ibid*, para. 21.

⁶³⁹ *Ibid*, para. 23. Compare also AG Tizzano's Opinion in the same case, paras. 26-28.

⁶⁴⁰ See below.

⁶⁴¹ See e.g. Burrichter, *supra* (2001), p. 545.

meaning and cannot be violated simply because the court's judgment is contradicted by the Commission's decision. In our view, in the *Irish ice cream case*,⁶⁴² the Irish judgment that was later contradicted by the Commission would most likely be perfectly enforceable under the then applicable Brussels Convention, since the disagreement between the two organs cannot amount by itself to a violation of public policy. Furthermore, the errors, if any, committed by the Irish court, do not by themselves suffice to qualify as public policy violation, since the public policy exception's function is not to lead to the review of the foreign judgment but rather to block its recognition or enforcement in order to avoid negative effects on the most fundamental social and economic values of the country of enforcement. We cannot see how a possible erroneous assessment by the national court of the ice cream market's foreclosure can qualify as a matter falling under the public policy exception and thus lead to non-recognition or non-enforcement of that judgment in other Brussels Convention signatories.

A fortiori, Article 16(1) of Regulation 1/2003 does not bind the judge granting the *exequatur* to refuse to recognise or enforce a national judgment that is in conflict with a Commission decision even in cases where there is no violation of public policy, as has been suggested by one commentator.⁶⁴³ There are compelling reasons to resist such an over-expansive reading of Article 16(1) of Regulation 1/2003. First, that would lead to an unacceptable sacrifice of legal certainty vis-à-vis final judgments having the force of *res judicata inter partes*. Second, it would not be in accordance with the principle of free movement of judgments in the Community⁶⁴⁴ and with more general long-standing principles of public international law and comity that allow only exceptionally for the non-enforcement or non-recognition of a foreign judgment. It is, therefore, preferable to refrain from such disproportionately intolerable intrusions into national procedural autonomy and into the spirit and text of international and Community instruments that deal with the recognition and enforcement of judgments. The exception of public policy remains a sufficient tool of review in those exceptional cases of flagrant violation of EC competition law by courts, irrespective of the existence of a contradictory Commission decision.

⁶⁴² See above.

⁶⁴³ This is the view of Schurmans, *supra* (2004), p. 101. That author follows the same approach also with regard to domestic judgments at the stage of their enforcement (execution). We find such an expansive reading of the *Masterfoods* principle and of Art. 16(1) Reg. 1/2003 inappropriate.

⁶⁴⁴ Especially post-Amsterdam and after the communitarisation of the Brussels Convention through *Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, OJ [2001] L 12/1. On this fundamental principle, see below the analysis in the context of arbitration.

iv. Fourth Scenario: Final National Court Judgment Finding a Violation of the Competition Rules and Envisaged Inapplicability Commission Decision

If the final judgment of the national court finds that there is a violation of EC competition law ("negative" judgment), the Commission has stressed that it would normally not seek to contradict that judgment.⁶⁴⁵ This more liberal approach of the Commission with regard to this kind of conflicts is explicable, because it is taken for granted that the public interest is not particularly harmed in a case of erroneous "over-application" of the competition rules by the national judges.⁶⁴⁶ However, the possibility of a conflict does not cease to exist, if the Commission chooses to initiate proceedings and render a decision contradicting the national judgment. The Commission's power to do so is undisputed. This has been the case under the system of administrative authorisation⁶⁴⁷ and will continue to be so under the system of legal exception. The result will be the co-existence of two conflicting decisions, one of applicability of Articles 81 or 82 EC (by the national court) and another of inapplicability (by the Commission). The latter kind of decision is one that only the Commission can take in its pursuit of the Community public interest.⁶⁴⁸ It should be stressed that the *Delimitis* and *Masterfoods* principles, along with Article 16(1) of Regulation 1/2003, apply also to this case. This means that any second or last instance court adjudicating on appeal or cassation must not contradict or must avoid contradicting the Commission's final or contemplated, respectively, decision.⁶⁴⁹

If the national court's judgment has become final, it will constitute *res judicata* as between the parties, while any likely positive decision by the Commission will only be an *erga omnes* "declaration". The national court's judgment will deal with the *inter partes* civil consequences of the perceived incompatibility with the EC competition provisions, whereas

⁶⁴⁵ See Schaub and Dohms, *supra* (1999), p. 1068. See also Jones and Sufrin, *supra* (2004), p. 1026, who stress that the Commission is more concerned about the "wrong" authorisation of anti-competitive agreements than it is about the "wrong" prohibition of harmless ones.

⁶⁴⁶ See Burrichter, *supra* (2001), p. 542. Whereas from a Community law angle this view may be correct, from a pure competition law angle it is unsatisfactory, since undue over-application of competition law distorts the market and creates asymmetries.

⁶⁴⁷ See on this specific case Saint-Esteben, "La mise en œuvre de l'Article 85 après l'arrêt de la Cour de justice des Communautés européennes du 6 février 1973 (aff. no. 48/72: *Brasserie de Haecht c/ Consorts Wilkin, Janssen*)", 9 RTDE 270 (1973), p. 287.

⁶⁴⁸ Art. 10 Reg. 1/2003.

⁶⁴⁹ It is also possible for the Commission (or for NCAs) to intervene in the appeal or cassation proceedings as *amici curiae* and, of course, the appeal court has always the power (or duty, if it is a court of last instance) to seize the ECJ under the preliminary reference procedure of Art. 234 EC, where, not to forget, the Commission's observations will in any event be heard (see on that point Schaub and Dohms, *supra* (1999), p. 1068).

the Commission in its declaratory decision will simply state that Articles 81 or 82 EC do not prohibit that specific conduct. The Commission's pronouncement will have been made in the Community public interest, without, however, affecting the national court's ruling. Contrary to the third scenario analysed above, since the Commission's decision will not be accompanied by an injunction, it will not affect the national *res judicata* in practical terms. At the same time, compliance by the parties with the national judgment will not offend against the Commission decision. Thus, for example, a contract will be void as between the litigants (personal scope of the *res judicata* effect) and any possible antitrust damages awards will stand.⁶⁵⁰

Naturally, if national procedural law allows, the losing party may request a reopening of the contested judgment, or it could sue the winning party for unjustified enrichment. The further civil proceedings that would follow as a result will, on their part, be pre-empted by the Commission decision and the national court this time would be bound to follow the Commission reasoning pursuant to Article 16(1) of Regulation 1/2003. Contrary, however, to the third scenario above, the principle of effectiveness of Community law in this case cannot go as far as offering a legal basis for the reopening of the contested judgment, if such recourse is unknown under national procedural law. The exigency of effectiveness of Community competition law cannot be of the same degree in the present case of "over-application" of EC competition law by national courts as in the above case of "under-application" which essentially leads to the upholding of a harmful anti-competitive practice. The only Community law duty imposed upon national courts is to interpret the pertinent conditions of national procedural law - if the latter allows in exceptional cases for such course - in conformity with EC law.

In addition, since this is a case of over-application of EC competition law by the national courts, which, as the Commission also admits, is not particularly offensive for the effectiveness and efficiency of the Treaty prohibitory provisions, such judgments of national courts can still always be recognised and/or enforced in other EU Member States, without being contrary to *ordre public communautaire*.⁶⁵¹

Finally, it should be mentioned that in all cases of national judgments conflicting with Commission Decisions and thus with Community law, the Commission can always choose to

⁶⁵⁰ In this sense and contrary to the third scenario discussed above, the practical result of this specific conflict between the national court's final judgment and the Commission's decision will be that the parties will have no other way but to comply with the national judgment.

⁶⁵¹ If it is accepted that the recognition/enforcement of a foreign judgment that upholds a serious violation of EC competition law constitutes an *ordre public* violation in the sense of Art. 34(1) Reg. 44/2001.

bring this infringement of Community law by the Member State before the Court of Justice under Article 226 EC. This rather extraordinary possibility that has been used very rarely in the past,⁶⁵² in order not to antagonise national judiciaries, will doubtlessly be used not very often.

v. Fifth Scenario: The Special Case of Commission Commitment Decisions under Article 9 of Regulation 1/2003

As already mentioned above, Commission decisions accepting and making binding on specific undertakings commitments are neither applicability nor inapplicability decisions. They merely close the administrative proceedings and state that as a result of the commitments offered the Commission no longer has an interest in pursuing the case. This particularity differentiates these decisions as to the effects they develop in national civil litigation.

Indeed, Recital 13 of Regulation 1/2003 stresses that commitments decisions do not bind national authorities and courts as to the applicability or non-applicability of Articles 81 and 82 EC but leave them free to decide whether or not there has been infringement of Community competition law.⁶⁵³ The last sentence of Recital 22 makes this clearer. This Recital corresponds to Article 16 which deals specifically with conflicts between Commission decisions and national courts' judgments and repeats that "commitment decisions adopted by the Commission do not affect the power of the courts ... of the Member States to apply Articles 81 and 82 of the Treaty".⁶⁵⁴ Such commitments decisions do not affect the courts' competences because their operative part is not in principle such as to lead to a conflict with the operative part of a judgment in the sense of *Masterfoods* or Article 16 of Regulation 1/2003.⁶⁵⁵

Therefore, the courts remain free to find an infringement of the competition rules notwithstanding the commitments decision and on the basis of that finding to order an injunction or award damages. Indeed, the finding of the infringement can refer not only to the

⁶⁵² C-129/00, *Commission v. Italy*, *op.cit.*, paras. 29-33. In the latter case the ECJ held Italy liable for infringement of the EC Treaty, because Italian courts, including the *Corte di Cassazione*, interpreted national law in a manner that violated Community law.

⁶⁵³ See on this point Paulis and Gauer, *supra* (2003), p. 68.

⁶⁵⁴ See, however, R. Whish, *Competition Law* (London, 2003), p. 257, who finds that Recital 13 Reg. 1/2003 is "a strange provision which sits oddly with Article 16".

⁶⁵⁵ See further Wils, "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003", 29 *World Competition* 345 (2006), p. 361 *et seq.*

period before the adoption of the commitments decision by the Commission⁶⁵⁶ but also after that.⁶⁵⁷ In such a case, the national judgment will have an *inter partes res judicata* effect, while the Commission's commitments decision will be binding *erga omnes*.

The situation, however, becomes more complicated with regard to national judgments finding that there has never been an infringement of the competition rules. While the language of Recitals 13 and 22 of Regulation 1/2003 states that courts are not deprived of their power to reach a finding of inapplicability, it is nevertheless true that the national courts' competence is circumscribed by the general principles of Community law and, in particular, by the principle that national courts cannot bring into question the validity and full effectiveness of Community acts.⁶⁵⁸ This may create certain problems. Thus, concretely speaking, the courts cannot meddle with the exercise of the Commission's discretion in the specific commitments decision. They must ensure that the binding commitments are respected in an effective way and they certainly cannot relieve the undertakings from them.⁶⁵⁹ Third parties perceived as the beneficiaries of the commitments must be able to plead the commitments before national courts and enforce them upon the recalcitrant promisor.⁶⁶⁰ At the same time, parties to agreements which have been *de iure* or *de facto* modified through commitments integrated into a decision, can no longer rely in court upon the original version of the agreements.⁶⁶¹

If these principles are valid, one wonders how much latitude remains for national courts to take an inapplicability decision. Conversely, if the courts remain free to disregard the duties imposed by the commitments decisions on their addressees and find them not in violation of competition law in the first place, the validity and binding effect of a Community act as well as the whole effectiveness of this enforcement tool is seriously impaired.

An attempt to resolve this complicated question, which might well end up eventually before the Court of Justice, must start from the fundamental premises on which *Masterfoods* rests: namely, (a) the central role of the Commission in the orientation and implementation of

⁶⁵⁶ Indeed, plaintiffs may be alerted by the commitments decision as to potential competition law violations and may thus seek damages. In so doing, they may seek assistance in the preliminary assessment or the statement of objections, which refer to the Commission's initial concerns, thus being helped in proving a violation of Art. 81 or 82 EC. On this possibility, see Montag and Cameron, *supra* (2005), p. 15.

⁶⁵⁷ See Wils, *supra* (2006), pp. 361-362. See *contra* Temple Lang, "Commitment Decisions under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision", 24 ECLR 347 (2003), p. 349, according to whom national courts are precluded from making findings that there is still an infringement if the commitment is being fully implemented because that would conflict with the Commission's finding that there are no longer grounds for its action. This unqualified view, however, contradicts the letter of Reg. 1/2003.

⁶⁵⁸ See above.

⁶⁵⁹ According to the Commission's public communication on commitment decisions, *op.cit.*, "national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures". See also para. 7 of the new co-operation Notice.

⁶⁶⁰ See Paulis and Gauer, *supra* (2003), p. 68.

⁶⁶¹ See Marengo, *supra* (2001b), p. 174.

European competition policy, as enshrined in Article 85 EC, (b) the duty of national courts to ensure the effectiveness of Community law, based on Article 10 EC, (c) the lack of competence of national courts to review the legality of Community measures, and (d) the principle of legal certainty. These four elements were considered by the Court of Justice sufficient in order to limit the scope of the principles of separation of powers and judicial independence. Besides, *Masterfoods* stressed the paramount role of the Court of Justice which remains the only final and authoritative interpreter of Community law. To that authority national courts must always defer.

On the basis of the above, it is our view that a commitments decision by the Commission cannot affect the competence of national courts to reach the conclusion that there has been no infringement of the Treaty competition rules and thus to refrain from enforcing the commitments as against their addressee. This is so, for the following reasons:

Firstly, it is doubtful whether a decision by the Commission to close proceedings and accept commitments represents a measure of orientation or implementation of the Treaty competition rules in the Article 85 EC sense. There may indeed be reasons of administrative convenience that have led the Commission to that decision. The recent practice of commitment decisions supports this argument.⁶⁶²

Secondly, the duty of national courts to respect the effectiveness of Community law and of Community acts recedes in a case where the Commission opted itself not to proceed to a clear declaration as to the applicability or inapplicability of Articles 81 or 82 EC. Effectiveness of Community law as such or as positively applied by the Commission cannot be equal to effectiveness of the commitments or of the general mechanism of Article 9 of Regulation 1/2003.

Thirdly, it is not all clear how the Court of Justice's authority over national courts fits into this mechanism. As stressed above, *Masterfoods* in reality does not establish a primacy of the Commission but rather of the Court of Justice. To the latter the national courts must always turn, if they have doubts about the validity of a Community act. It remains unclear, however, how the national court brings into question the validity of a Community act by deciding that there has been no infringement of competition law. The Commission's decision does not contain any explicit finding as to the latter question; therefore its validity is not formally questioned by the national court. It is also unclear what the national court can seize the Court of Justice with.

⁶⁶² In none of the published commitment decisions did the Commission indicate that it was positively taking a measure of formulation of Community competition policy.

In sum, in our view, a commitments decision does not impose on national courts a duty to give effect to it, if the courts find *inter partes* that the conduct in question is not anti-competitive. Of course, the Commission itself retains the power to impose fines and periodic penalty payments under Articles 23(2)(c) and 24(1)(c) of Regulation 1/2003 as against the recalcitrant addressee of the commitments decision, irrespective of the national judgment that finds him not in violation of the competition rules. This means that the problem above becomes more theoretical than practical, since the addressee of the Commission decision, even if victorious before the national courts, will practically have no other option but to comply with the binding commitments of the decision.

C. THE SUBSTANTIVE AND PROCEDURAL LAW ASPECTS OF EC PRIVATE ANTITRUST ENFORCEMENT

1. Moving from a Decentralised System to a System of Private Enforcement

a. Decentralisation: A Necessary but Insufficient Tool to Promote Private Enforcement

The decentralisation brought forward by the new Regulation 1/2003 did not raise disproportionately high expectations in Europe of a US-like system of private antitrust enforcement. The majority of commentators was of the view that while the Article 81(3) EC Commission exemption monopoly was an obstacle,⁶⁶³ its mere abolition would not by itself energise private enforcement. In this sense Regulation 1/2003 was, in the words of a commentator, “a necessary but not sufficient condition to promote private action in Europe”.⁶⁶⁴ It was thus thought that the modernisation project and the direct effect of Article 81(3) EC, though in the right direction, would not contribute significantly towards the development of a system of effective private enforcement.⁶⁶⁵

According to this line of argument, Article 81(3) EC and the possibility of an exemption under the old system rarely come into play in cases, where there is substantial liability of a person that has committed a serious violation of the competition rules and has inflicted harm upon another. Damage is more likely to be the result either of very serious anti-competitive practices that were not previously notified and would not in any case benefit from Article 81(3) EC or of abuses of dominant position under Article 82 EC, whose enforcement is not affected by the reforms and which has long been recognised as directly effective and concurrently enforceable by the Commission and national courts. With the possible exception of some minor cases, where civil liability might have arisen but the likelihood of a Commission exemption may have blocked civil litigation, not much changed on 1 May 2004 as to the possibilities of more private enforcement.

Many follow-up problems remained that were not sufficiently addressed by the Commission in its modernisation initiative. These problems refer basically to the weaknesses of the substantive and procedural framework of civil litigation in the EU, which is up to a great

⁶⁶³ See *supra*.

⁶⁶⁴ See Norberg, *supra* (2003), p. 29. See also *Commission XXXIVth Report on Competition Policy – 2004* (Brussels/Luxembourg, 2005), p. 15, speaking of Reg. 1/2003 as “a first step in strengthening private enforcement before national courts by giving the latter the power to apply Article 81(3)”.

⁶⁶⁵ See e.g. Riley, *supra* (2003a), pp. 612-613; *idem, supra* (2003b), p. 665 *et seq.*; Venit, *supra* (2005), p. 151.

extent governed by national and not Community law and which is not well-adapted to the difficulties of civil antitrust litigation. Besides, national civil courts have to engage in a full assessment of complex legal and economic circumstances that are not limited to the specific agreement or practice but refer to whole markets.⁶⁶⁶ If even the Commission, a supranational institution of considerable resources, experience, and powers finds it at times extremely difficult to prove the existence of anti-competitive practices, the burden placed upon national litigants and courts can really be insurmountable.

b. EC Private Antitrust Enforcement Between National and Community Law

At the heart of private antitrust enforcement in Europe lies the question of the relationship between Community and national law. At the current stage of European integration, rights and obligations emanating from Community law are in principle enforced under national law and before national courts. The Community legal order is not a federal one and the Community acts only within the limits of the powers conferred upon it by the EC Treaty. The Community standard is that Community law is enforced primarily by having recourse to national administrative and civil law before national administrative authorities and national courts.⁶⁶⁷

Thus, on the side of *substance*, there is no Community law of contract, tort or unjustified enrichment, or a European Civil Code. Indeed, even if the Community had the power or intention to legislate in such a vast cross-sector area, it would be almost impossible to arrive at a common denominator applicable across the EU Member States, taking into account the century-long divisions in the European legal systems and families. Equally, on the side of *procedure*, there are no Community courts of full jurisdiction that could basically apply Community law and deal with Community law-based claims. Although the proposal has already been made to introduce Community courts of general jurisdiction, following the US model of federal circuit courts,⁶⁶⁸ the current judicial structure is bound to remain unchanged for some time. National courts act also as “Community courts” of full jurisdiction (*juges communautaires de droit commun*).⁶⁶⁹

⁶⁶⁶ See Braakman, *supra* (2000), p. 167.

⁶⁶⁷ See *supra*.

⁶⁶⁸ See e.g. Sullivan, “Antitrust around the World”, (2000) *Antitrust Report* 30, pp. 31-32.

⁶⁶⁹ See Skouris, “The Proposals for the Reform of the Community System of Judicial Protection: On the Basis of the Draft Constitution of the European Union”, in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in Greek], p. 18, with references

It is true that in the last twenty years, much has changed and one can now speak of a *positive integration* drive to unify or harmonise rules on remedies and procedures. Thus, there is now, for example, secondary Community legislation on substantive and procedural rules in the area of consumer protection,⁶⁷⁰ public procurement,⁶⁷¹ sex and racial discrimination,⁶⁷² unfair commercial practices,⁶⁷³ electronic commerce,⁶⁷⁴ late payments,⁶⁷⁵ and enforcement of

to Art. I-29(1)(b) of the European Constitution Treaty which stresses that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

⁶⁷⁰ See e.g. *Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises*, OJ [1985] L 372/31; *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, OJ [1993] L 95/2; *European Parliament and Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts*, OJ [1997] L 144/19; *European Parliament and Council Directive 98/27/EC of 19 May 1998 on Injunctions for the Protection of Consumers' Interests*, OJ [1998] L 166/51; *European Parliament and Council Directive 1999/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, OJ [1999] L 171/12; *European Parliament and Council Directive 2002/65/EC of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC*, OJ [2002] L 271/16.

⁶⁷¹ See e.g. *Council Directive 89/665/EEC of 21 December 1989 on the Co-ordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts*, OJ [1989] L 395/33; *Council Directive 92/13/EEC of 25 February 1992 Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors*, OJ [1992] L 76/14. See also *Commission Proposal for a Directive Amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts*, COM(2006) 195 final. See further Metaxas, "Public Procurement Contracts and Community Law: The Interrelationship between National and Community Regulatory Framework and the Relevant Case Law of the ECJ", 48 *Epitheorissi Dimosion Dikaion kai Dioikitikou Dikaion* 441 (2004) [in Greek], p. 448. Note that the fact that a contract may fall below the thresholds for the application of the public procurement Directives does not mean that primary Community law does not impose limits on the national legal orders. Thus, individuals are always entitled to effective judicial protection of the rights they derive from the Community legal order, even if secondary Community legislation (i.e. the remedies Directives) is not applicable. Compare the *Commission Interpretative Communication on the Community Law Applicable to Contract Awards not or not Fully Subject to the Provisions of the Public Procurement Directives*, OJ [2006] C179/2, section 2.3.

⁶⁷² From among the new generation measures, see e.g. *Council Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination Based on Sex*, OJ [1998] L 14/6; *Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin*, OJ [2000] L 180/22; *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation*, OJ [2000] L 303/16; *European Parliament and Council Directive 2002/73/EC of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions*, OJ [2002] L 269/15; *Council Directive 2004/113/EC of 13 December 2004 Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services*, OJ [2004] L 373/37.

⁶⁷³ *Parliament and Council Directive 2005/29/EC of 11 May 2005 Concerning Unfair Business-to-consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')*, OJ [2005] L 149/22. See further Stuyck, Terryn and Van Dyck, "Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market", 43 *CMLRev.* 107 (2006).

⁶⁷⁴ *Directive 2000/31/EC*, OJ [2000] L 178/1.

⁶⁷⁵ *European Parliament and Council Directive 2000/35/EC of 29 June 2000 on Combating Late Payment in Commercial Transactions*, OJ [2000] L 200/35.

intellectual property rights,⁶⁷⁶ where indeed one can note a more active stance of the Community legislator. However, with very few exceptions,⁶⁷⁷ these are sectoral rules applying to very specific areas that are considered important for the attainment of the most basic objectives of the Community. This remarkable progress cannot change the basic reality that there are no cross-sector Community rules of administrative or civil law dealing with the enforcement of Community law-based rights.

Overambitious projects to harmonise or unify national civil rules on contract and tort and national procedural rules have had rather modest results, not least because of the very defensive - if not hostile - attitude of the legal professions in the Member States. The long-standing proposal - or rather wish - to introduce at some point a European Civil Code has been watered down to proposals to improve the coherence of the existing and future sectoral *acquis*, especially with regard to the *acquis* relevant to consumer protection, and to reflect on the opportuneness of an optional instrument on European contract law, which would provide parties to a contract with a body of rules particularly adapted to cross-border contracts in the internal market.⁶⁷⁸ An even more ambitious project to harmonise national civil procedural laws had a rather worse fate and was abandoned.⁶⁷⁹

⁶⁷⁶ European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ [2004] L 195/16.

⁶⁷⁷ See Council Directive 2002/8/EC of 27 January 2003 to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for Such Disputes, OJ [2003] L 26/41. This is one of the few exceptional cross-sector legislative measures, though again limited to cross-border matters. Compare S. Weatherill, *EU Consumer Law and Policy* (Cheltenham/Northampton, 2005), p. 240, who in respect of this Directive notes emerging traces of a "European legal space".

⁶⁷⁸ See Commission Communication of 11 July 2001 to the Council and the European Parliament on European Contract Law, COM(2001) 398 final, OJ [2001] C 255/1; Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law, An Action Plan*, OJ [2003] C 63/1; Council Resolution on 'A More Coherent European Contract Law', OJ [2003] C 246/1; Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the acquis: The Way Forward*, COM(2004) 651 final. On the original plans related to the possible introduction of a European Civil Code and the subsequent developments, see Legrand, "Against a European Civil Code", 60 MLR 44 (1997); Basedow, "The Renaissance of Uniform Law: European Contract Law and its Components", 18 LS 121 (1998); Schmid, "Legitimacy Conditions for a European Civil Code", 8 MJ 277 (2001); Weatherill, "European Contract Law: Taking the Heat out of Questions of Competence", 15 EBLR 23 (2004). On the 2001 Communication and its aftermath, as well as on other Community instruments, such as on the 2001 Green Paper on EU Consumer Protection (*Commission Green Paper on European Union Consumer Protection*, COM(2001) 531 final), see e.g. Antonioli Deflorian, "Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law - A Uniform Law?", 2(2) *Global Jurist Frontiers*, Article 4. On the constitutional law underpinnings of the development of a "European contract law" and of a "European Civil Code" see more generally Remien, "Europäisches Privatrecht als Verfassungsfrage", 40 EuR 699 (2005).

⁶⁷⁹ On this and other similar projects see e.g. Storme (Ed.), *Rapprochement du droit judiciaire de l'Union européenne* (Dordrecht/Boston/London, 1994); Kerameus, "Procedural Harmonization in Europe", 43 Am.JComp.L 401 (1995); Gilles, "Vereinheitlichung und Angleichung unterschiedlicher nationaler Rechte - Die Europäisierung des Zivilprozeßrechts als ein Beispiel", 7 ZZPInt. 3 (2002), p. 8 *et seq.* This result illustrates well the fact that a harmonisation or communitarisation of procedure is more *taboo* than a harmonisation of substantive laws.

Consequently, as the law currently stands, natural and legal persons relying upon Articles 81 and 82 EC have no other means to pursue their civil claims but to have access to national courts and laws. This means that the substantive and procedural conditions of civil antitrust enforcement can be quite different in Europe, depending on which national law applies and which national court adjudicates. Inconsistencies and inadequacies of national laws on remedies and procedures are certainly a source of serious concern not just for EC competition law but for Community law in general. In this context, the problem can be identified in three different, albeit interconnected, levels:⁶⁸⁰

- *Firstly*, there is a problem for the *effective or adequate judicial protection*, i.e. for the effective protection of Community rights.⁶⁸¹ As the Court of Justice has recognised, Articles 81 and 82 EC “tend by their very nature to produce direct effects in relations between individuals [and] create direct rights in respect of the individuals concerned which the national courts must safeguard”. Failure to afford this safeguard, “would mean depriving individuals of rights which they hold under the Treaty itself”.⁶⁸² This is of course an old question transcending the boundaries of EC competition law. Indeed, since the 1980s the duality Community rights-national remedies has been elevated to the central issue in “second” and “third generation” Community law, to use a “classical” expression.⁶⁸³
- *Secondly*, there is a problem for the *effectiveness* of the whole system of Community law as such, and, more particularly, for the *efficiency* of the Community (competition) rules. There are *two facets* here. One is Community law-specific and the other is competition law-specific. The first facet of the problem is that when citizens pursue their Community rights before the *juges communautaires de droit commun*, apart from serving their private interests, they also become instrumental and indirectly act in the Community interest, becoming “the principal ‘guardians’ of the legal integrity

⁶⁸⁰ See further Komninos, *supra* (2002), p. 464.

⁶⁸¹ On this central to Community law principle among the abundant works, see Van Gerven, “Of Rights and Remedies in the Enforcement of European Community Law before National Courts: From the Communitarization of Domestic Law towards the Europeanization of Community Law”, VIII(1) *Collected Courses of the Academy of European Law* (1997) 241, p. 247 *et seq.*; T. Tridimas, *The General Principles of EC Law* (Oxford, 1999), p. 276 *et seq.*; Rodriguez Iglesias, “Judicial Protection of the Citizen under European Law”, in: Markesinis (Ed.), *The Clifford Chance Millennium Lectures, The Coming together of the Common Law and the Civil Law* (Oxford/Portland, 2000), p. 195 *et seq.*

⁶⁸² *BRT v. SABAM (I)*, *op.cit.*, paras. 16 and 17.

⁶⁸³ See Curtin and Mortelmans, “Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script”, in: Curtin & Heukels (Eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, Vol. II (Dordrecht/Boston/London, 1994).

of Community law within Europe".⁶⁸⁴ The direct effect doctrine was developed partly with this consideration in mind. The second – competition law-specific – facet refers to the "private attorney-general" role of individuals in antitrust cases.⁶⁸⁵ In a mature antitrust system, private enforcement is a necessary complement, by no means inferior to or weaker than public enforcement. In such a system private actions, and – we should stress – in particular, actions in damages, are focal to the whole system's efficiency.⁶⁸⁶

- *Thirdly*, disparities and inadequacies of national legal systems are offending against the principle of *consistent and uniform application of Community law*.⁶⁸⁷ It has been persuasively argued that the requirement of uniform application or enforcement is not "an all-embracing *principle* which does not allow for national principles".⁶⁸⁸ Therefore, national remedial and procedural discrepancies up to a certain extent are unavoidable. It is arguable, however, that such discrepancies are particularly regrettable from an EC *competition* law point of view, because they tend to create variations in the costs of the enforcement of the EC antitrust rules and, thus, unequal conditions of competition among the Member States.⁶⁸⁹

In the decentralised system of antitrust enforcement the problem is accentuated. Competitors and economic actors in general take seriously into account the likeliness of public or private antitrust action in defining their market strategies. In this context, especially damages have a powerful impact on business behaviour.⁶⁹⁰ Capitalisation by an economic operator on its

⁶⁸⁴ See Weiler, *supra* (1999), p. 20. Private enforcement can also further the effectiveness of other areas of Community law, apart from EC competition law. Such is the case for example of Community environmental law (see in this regard Somsen, "The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?", 1 YEEL (2000) 311, p. 312 *et seq.*).

⁶⁸⁵ See *supra*.

⁶⁸⁶ On this particular point, see below the analysis of the ECJ's *Courage* ruling.

⁶⁸⁷ On the principle of uniform application of Community law, see Fines, "L'application uniforme du droit communautaire dans la jurisprudence de la Cour de justice des Communautés européennes", in: *Études en l'honneur de Jean-Claude Gauthier, Les dynamiques du droit européen en début de siècle* (Paris, 2004), p. 334.

⁶⁸⁸ See Van Gerven, "Of Rights, Remedies and Procedures", 37 CML Rev. 501 (2000), p. 503 (emphasis in the original text). The author goes on to argue that "although the objective of uniform enforcement of Community law throughout the Community is a fundamental requirement of the Community legal order that must be pursued as much as possible, it is not a Community law principle of the same nature as direct effect, supremacy, or access to a court" (p. 522). In the same spirit see Fines, *supra* (2004), p. 336.

⁶⁸⁹ It is interesting to note that this argument in favour of more uniformity has been used not only in the antitrust area itself but also in the EC labour law field, since the principles of equivalence and effectiveness cannot extinguish cost variations in the enforcement of EC labour legal provisions in the different EU Member States. See in this respect Ryan, "The Private Enforcement of European Union Labour Laws", in: Kilpatrick, Novitz & Skidmore (Eds.), *The Future of Remedies in Europe* (Oxford/Portland, 2000), pp. 161-162.

⁶⁹⁰ See Jones, *supra* (2003), p. 103, who quotes senior officers of a US company which had settled a monopolisation action against IBM for more than \$ 100 million as boasting "that the lawsuit had been the best investment the company had ever made". Another telling example of the importance that triple damages awards can have in the business world is the specific case of a US company (Information Resources Inc.) that became

"immunity" from civil actions in damages and the failure of victims to be adequately compensated in a certain jurisdiction, as opposed to other jurisdictions where companies are constantly successfully or unsuccessfully defending civil antitrust actions and victims get fully compensated, is hardly compatible with the creation of "a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market", as the new Regulation 1/2003 propagates.⁶⁹¹

The Court of Justice⁶⁹² has recognised in a consistent line of judgments, though very rarely referring to it by name,⁶⁹³ the "procedural/remedial and institutional autonomy" of the Member States⁶⁹⁴ to identify the remedies, courts and procedures that are necessary for the exercise of Community law rights at the national level.⁶⁹⁵ More importantly, however, the

the subject of a takeover bid by US private equity investors (Gingko), precisely because its chief asset was pending antitrust litigation against its rivals that had colluded to drive it out of business (*Global Competition Review*, Electronic Newsletter, 26 September 2003). While such commoditisation and commercialisation of antitrust civil claims may not be desirable, these examples certainly make the point that damages actions and awards affect business behaviour.

⁶⁹¹ Recital 8. See also Recital 1, which speaks of the necessity for Arts. 81 and 82 EC to "be applied effectively and *uniformly* in the Community" (emphasis added), and Impact Assessment Form of the September 2000 regulation proposal, p. 56, where reference is made to a "level playing field for companies in the internal market by ensuring more widespread application of the Community competition rules". See further Temple Lang, "Rapport général", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), p. 290; Paulis, *supra* (2001a), p. 399, according to whom, divergencies in the enforcement of the antitrust rules constitute discrimination that can lead to distortions of competition in the market.

⁶⁹² The role of the CFI in this area is rather non-existent, since these legal issues arise in ECJ preliminary reference cases.

⁶⁹³ One rare exception is case C-201/02, *The Queen ex parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723. In para. 70 of its ruling, the ECJ stresses the following: "Under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337. The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, *under the principle of procedural autonomy of the Member States*, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)" (emphasis added).

⁶⁹⁴ On the question whether a principle of "national procedural autonomy" really exists see the provocative article by the late ECJ judge Kakouris, "Do the Member States Possess Judicial Procedural 'Autonomy'?", 34 *CMLRev.* (1997) 1389. According to Kakouris, national remedial and procedural systems are subservient to Community law. Thus, the "principle" of national procedural autonomy is a descriptive term that does not mean that the Community lacks the power to legislate or regulate such procedural and remedial rules as are necessary for the enforcement of substantive Community rules. See further V.A. Christianos, *Dynamics in the Relations between Judiciary and Legislature in the European Community* (Athens/Komotini, 2005) [in Greek], pp. 88-89; *contra* Pavlopoulos, *supra* (1993), p. 119, who sees that principle through the perspective of an exclusive power of national law to deal with these matters. Some commentators approach the principle of national procedural autonomy in the context of subsidiarity (see e.g. Gautron, *supra* (1998), pp. 5-7, speaking of "judicial subsidiarity").

⁶⁹⁵ The term "procedural autonomy" creates the wrong impression that this principle refers only to national rules of civil, administrative or criminal procedure. However, its scope is much larger and covers all substantive or procedural mechanisms at national level that can be used for the enforcement of Community law. That is why the term "remedial/procedural autonomy" is more preferable. Besides, it is not always clear among the EU Member States legal systems where substance stops and procedure begins and *vice versa*. See on this question

Court has also imposed demanding Community limits and safeguards upon that autonomy.⁶⁹⁶ These are the principles of *equality* and *effectiveness*.⁶⁹⁷ The first one means that the enforcement of Community law at the national level should not be submitted to more onerous procedures than the enforcement of comparable national law. The second requirement, which is a direct consequence of the principles of *direct effect* and *supremacy*,⁶⁹⁸ is a much harder test. It means that although Community-derived rights will have to count on national substantive and procedural remedies in order for them to be enforced, such remedies still have to be *effective* and must not render the exercise and enforcement of such rights impossible or unjustifiably onerous. It reflects a more general guiding principle of Community law, the principle of full and useful effectiveness (*effet utile*).⁶⁹⁹ Undoubtedly those two requirements make less burdensome the national divergences that we described above (*negative integration* side). To all these we must add also the Article 234 EC preliminary reference procedure, whose importance is paramount for any attempt to proceed to a private enforcement system of EC competition law.

The Court of Justice has, nevertheless, proceeded further than that. It has also recognised the existence of autonomous Community law remedies and has delegated to national law only the very specific conditions for their exercise as well as the procedural framework rules, and this, always under the limitations of equality and effectiveness. In doing so, it has relied upon "the full effectiveness of Community rules and the effective protection of the rights which they

Bergé and Sinopoli, "Droit des obligations et autonomie procédurale : La distinction fond/procédure sous le double éclairage du droit communautaire et du droit des États membres", *Petites Affiches*, 24-8-2004, No. 169, 7, pp. 8-10.

⁶⁹⁶ On the remedial and procedural autonomy of Member States and its Community law limits, see e.g. Tridimas, "Enforcing Community Rights in National Courts: Some Recent Developments", in: O'Keefe & Bavasso (Eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. I, *Judicial Review in European Union Law* (The Hague/London/Boston, 2000), p. 465 *et seq.*; Kilpatrick, "The Future of Remedies in Europe", in: Kilpatrick, Novitz & Skidmore (Eds.), *The Future of Remedies in Europe* (Oxford/Portland, 2000), p. 2 *et seq.*; Vilaras, "Judicial Protection of Individuals", in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in Greek], p. 43; Mehdi, "Le Revirement jurisprudentiel en droit communautaire", in: *L'intégration européenne au XXI^e siècle, En hommage à Jacques Bourrinet* (Paris, 2004), pp. 122-123; J.-V. Louis and T. Ronse, *L'ordre juridique de l'Union européenne* (Bruxelles/Paris, 2005), pp. 262 *et seq.* and 292 *et seq.*

⁶⁹⁷ See e.g. case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, [1976] ECR 1989, para. 5; case 45/76, *Comet BV v. Produktschap voor Siergewassen*, [1976] ECR 2043, paras. 12-13; case 199/82, *Amministrazione delle Finanze dello Stato v. San Giorgio*, [1983] ECR 3595, para. 12; case C-261/95, *Rosalba Palmisani v. Istituto Nazionale della Previdenza Sociale (INPS)*, [1997] ECR I-4025, para. 27.

⁶⁹⁸ See Louis and Ronse, *supra* (2005), p. 296.

⁶⁹⁹ See Karageorgou, *supra* (2005), p. 18. On the principle of effectiveness (*effet utile*) see *inter alia* Dubos, *supra* (2001), p. 278 *et seq.*; Zuleeg, "Die Wirksamkeit des Europarechts", in: Colneric, Edward *et al.* (Eds.), *Une Communauté de droit, Festschrift für Gil Carlos Rodríguez Iglesias* (Berlin, 2003), pp. 222 and 228 *et seq.*

confer" and upon the duties that Article 10 EC imposes on Member States and on their judicial organs.⁷⁰⁰

A former Advocate General of the Court of Justice and eminent scholar of Community law has, therefore, proposed a more global approach of the issue of remedies in Community law, thus stressing the requirement of effective judicial protection that better describes the Court's case law on remedies. Professor Van Gerven speaks of four already existing Community substantive remedies: a general one, to have national measures conflicting with EC law set aside,⁷⁰¹ and three specific ones, compensation, interim relief and restitution.⁷⁰² Individual civil liability is integrated in the first limb of these three specific remedies, at the side of its - admittedly much more developed - sibling, state liability.⁷⁰³

The former Advocate General furthermore makes a distinction between "constitutive" and "executive" elements of remedies. The first pertain to the principle of the remedy as such, whereas the second to its "content and extent". The first elements must be uniform, since they are utterly connected with the Community "right", of which individuals avail themselves. The executive elements, instead, may, up to a certain extent, be governed by national law, but only under more substantial Community requirements. For these elements Community law should require an "adequacy test", rather than a mere "minimum effectiveness" or "non-impossibility" one, which may continue to apply for simple procedural rules.⁷⁰⁴

On the basis of the above, it is unfortunate that Article I-29(1)(b) of the (so far) ill-fated Treaty establishing a Constitution for Europe has missed totally this point and uses the following unsophisticated text: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". While the intention was clearly to ensure the effective judicial protection of Community-law based rights,⁷⁰⁵ the language used seems to imply that the corresponding remedies⁷⁰⁶ are a matter of national law only. Such a reading, nevertheless, would not only contradict the case law of the Court of Justice ever since *Factortame I* and *Francovich*, but would also not be in conformity with the spirit

⁷⁰⁰ Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany* and *Regina v. Secretary of State for Transport, ex parte Factortame Ltd. et al. (Factortame III)*, [1996] ECR I-1029, para. 39. On the Art. 10 EC legal basis, see in particular Temple Lang, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflexions", 26 ELRev. 84 (2001), p. 87.

⁷⁰¹ This general remedy, in our view, encapsulates the duties of national courts to ignore national law that conflicts with directly effective Community law (principles of supremacy and direct effect) and to interpret national law in conformity with Community law.

⁷⁰² See Van Gerven, *supra* (2000), p. 503.

⁷⁰³ On the extension of this principle to cover individual civil liability, see below.

⁷⁰⁴ See Van Gerven, *supra* (2000), pp. 502-504, 524-526.

⁷⁰⁵ See Skouris, *supra* (2004a), p. 18.

⁷⁰⁶ This is the only time that the European Constitution refers to "remedies".

and system of the European Constitution itself. It is clear that this provision, which is a paragraph in the Article dealing with the Court of Justice, should not be considered a rule on competences. Its aim is to energise the national courts and to point to the duties that these have as Community judges of general jurisdiction. Therefore, the rationale of this provision cannot be to exclude that in appropriate cases Community law itself may provide for substantive remedies

3. The Substantive Law Framework

a. Nullity

aa. Nullity of Anti-Competitive Agreements under Article 81(2) EC

Article 81(2) EC is the only express provision in the EC Treaty that bears on private legal relationships. As such, it was a rather bold and exceptional provision for 1957 to be included in an international treaty.⁷⁰⁷ This certainly highlights the importance of the competition rules and their binding nature.⁷⁰⁸

Article 81(2) EC is usually raised by means of defence by one of the litigants-parties to an alleged anti-competitive contract ("shield litigation"). While it is generally true that the raising of EC competition law by means of "shield", i.e. by means of defence to an action based on contractual liability or on unfair competition law, may not constitute pro-active private antitrust enforcement, it still constitutes the exercise of a Community right, directly derived from the Treaty. In certain circumstances, apart from protecting the private interests of the person raising the "Euro-defence", it may also further the effectiveness of the competition rules and in that sense it serves the public interest, in particular when that defence is raised by many litigants in multiple litigation proceedings. Such can be the case of network agreements and of multiple litigation when one undertaking claims damages from several parties for breach of such agreements. Exactly as the cumulative effect of such agreements may pose a problem for competition, the cumulative effect of the raising of the "Euro-defence" may constitute a powerful civil sanction of the competition law violation.

⁷⁰⁷ See e.g. Gavalda and Parleani, *supra* (2002), p. 355, who do not miss the exceptionality point.

⁷⁰⁸ See E. Steindorff, *EG-Vertrag und Privatrecht* (Baden-Baden, 1996), p. 308, who sees the Art. 81(2) EC civil sanction not only from the perspective of individual rights but also from the perspective of the full and effective application of EC law. See also below on the *Eco Swiss* and *Courage* references to the role of Art. 81(2) EC.

National courts are required under Community law to render the application of Article 81(2) EC as effective as possible. The Court of Justice in *Eco Swiss* and *Courage* relied exactly on that provision to stress the primacy of Article 81 EC in the system of the Treaty, since it “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”.⁷⁰⁹ Thus, any obstacles that national law poses to the exercise of the right to defend oneself against an action aiming at giving effect to anti-competitive conduct would be contrary to Community law and to the principle of effectiveness. Indeed, a certain reticence on the part of national courts to admit such defences based on Community competition law must be regarded as offending against effective judicial protection and the *effet utile* of the prohibitions of Articles 81 and 82 EC.

For this reason the attitude of English courts to view with extreme suspicion the “Euro-defence” in actions of contractual liability or of infringement of intellectual property rights does not accord with Community law.⁷¹⁰ To give an example, there are serious doubts as to the compatibility with EC law of the approach of the English judges that there must be a nexus between an alleged violation of Articles 81 and 82 EC and the relief sought by the plaintiff for infringement of an intellectual property right, in order for plaintiff’s claim to fail.⁷¹¹

bb. The Nature of the Article 81(2) EC Nullity

The nullity of Article 81(2) EC has a Community law meaning,⁷¹² although all national legal systems avail themselves of equivalent notions. Thus, the only applicable norm in case of an

⁷⁰⁹ Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] ECR I-3055, para. 36; *Courage*, *op.cit.*, para. 20.

⁷¹⁰ See e.g. Jones and Sufrin, *supra* (2004), p. 1199.

⁷¹¹ See e.g. *Ransburg-Gema AG v. Electrostatic Plant Systems Ltd.* (Pat.Ct.), [1989] 2 CMLR 712; *Hewlett-Packard v. Expansys* (Ch.D.), [2005] EWHC 1495; *Sportswear Company SpA et al. v. Ghattaura and Stonestyle*, [2005] EWHC 2087. In *Chiron Corp. v. Murex Diagnostic* (CA), [1994] 1 CMLR 410, a patent case, the English Court of Appeal granted injunctive relief to plaintiff, although the defendant had raised a breach of Art. 82 EC. According to the court, it would have been disproportionate to deny interim relief to plaintiff, while the defendant could always bring a damages claim for breach of Art. 82 EC or complain to the Commission! For an equally disappointing case see *ICI v. Berk Pharmaceuticals*, [1981] 2 CMLR 75, where no nexus was found between the alleged abuse and the tortious liability of the defendant. For critical comments of these judgments see e.g. Tritton, Davis, Edenborough, Graham, Malynicz and Roughton, *supra* (2002), p. 941 *et seq.* Dutch courts have also been reproached for being “reluctant” to apply Arts. 81 and 82 EC, when the latter are used to attack the *status quo* of contractual agreements. See in this regard Ver Loren van Themaat, Adema, Rijsberger, Schutte and Sevinga, “Rapport néerlandais”, in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), pp. 212-213.

⁷¹² Case 56/65, *Société Technique Minière (LTM) v. Maschinenbau Ulm GmbH (MBU)*, [1966] ECR 235, at 250. See Schröter, *supra* (2003), p. 310.

agreement that is contrary to Article 81 EC will be Article 81(2) EC to the exclusion of similar norms on nullity of illegal contracts under national law. This is because of the specificity of the Community norm.⁷¹³ The nullity has a retroactive effect;⁷¹⁴ it is automatic and comes as an *ipso iure* consequence of the application of Article 81 EC as a whole to a specific agreement, no prior administrative or judicial decision to that effect being required.⁷¹⁵ The nullity is absolute, which means that it has an *erga omnes* effect. Therefore, it can also be invoked even by co-contractors⁷¹⁶ and, most importantly, by third parties, as indeed the Court of Justice has stressed in its very recent *Manfredi* ruling.⁷¹⁷ The national

⁷¹³ Of course, national general provisions on nullity may be applicable, if the agreement in question is lawful under Art. 81 EC, yet it is considered unlawful under national (not competition) law. In this case, the supremacy of Community competition law is unaffected, since the agreement will fail not because it is incompatible with national competition law, but rather with national law that pursues other objectives (e.g. the protection of the weaker party in negotiations). See in this regard Art. 3(3) in fine Reg. 1/2003, which allows the application of stricter national law that predominantly pursues other objectives than Arts. 81 and 82 EC.

⁷¹⁴ *Brasserie de Haecht II*, *op.cit.*, para. 27.

⁷¹⁵ *Brasserie de Haecht II*, *op.cit.*, paras. 6 and 25.

⁷¹⁶ Most Member States' legal systems have found no difficulty in recognising this. See e.g. Günther, *supra* (2001), p. 394, on Austrian law; Erämetsä, *supra* (2001), p. 220, on Finnish law; Boulanger, *supra* (1997), pp. 225 and 292; Winckler, "Remedies Available under French Law in the Application of EC Competition Rules", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), pp. 122-123, on French law; Braun, *supra* (1996), p. 575, on German law; Ligustro, "Italie", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. I, *United Kingdom and Italy* (Baden-Baden, 1992), pp. 254-255; Siri, in: Marchetti & Ubertazzi (Eds.), *Commentario breve al diritto della concorrenza, Antitrust, Concorrenza sleale, Pubblicità, Marchi, Brevetti, Diritto d'autore* (Padova, 1997), p. 42, on Italian law, in which the *ordre public* nature of EC competition rules leads to the disapplication of the principle *nemo auditur turpitudinem suam allegans*. The only exception has been English law, in which that *audage* excluded the invocability of the Art. 81(2) EC nullity, notwithstanding its absolute nature under Community law. This issue was referred by the English Court of Appeal to the ECJ (along with the more important questions on damages) in the *Courage* case. The Court's answer was unequivocal. Having recourse to earlier case law, (references to case 10/69, *SA Portelange v. SA Smith Corona Marchant International et al.*, [1969] ECR 309; case 22/71, *Béguelin Import Co. v. SAGL Import Export*, [1971] ECR 949; and *Brasserie de Haecht II*, *op.cit.*) it stressed the automatic and absolute nature of the nullity, which results in having absolutely no effects as between co-contracting parties and in not being possible to be set up against third parties. Any individual, according to the Court, could rely on a breach of Article 81(1) EC before a national court, even if he was a party to an anti-competitive contract (*Courage*, *op.cit.*, para. 24). On the issue see also Van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 55, who cites pertinent precedents, referring also to the Opinion of AG Mayras in *De Bloos*, *op.cit.* The AG in that case had left no doubt that the rule *nemo auditur suam turpitudinem allegans* did not prevent co-contracting parties from relying on the voidness of their contract, in view of the public policy character of Art. 81(2) EC. See also in this direction Hubeau, "La nullité, au sens de l'article 85§2 du Traité CEE des accords et décisions incompatibles avec le marché commun", in: *Liber amicorum Josse Mertens de Wilmars* (Antwerpen/Zwolle, 1982), p. 103; Norberg, "The Complementarity of Community Remedies and of National Remedies (Such as Damages Available in Competition Cases in National Courts when a Community Institution has Determined a Violation of the Competition Provisions in the Treaty of Rome)", in: Sundström & Kauppi (Eds.), *Access to Justice, A Record of Thoughts and Ideas Dealing with the Interrelationship between National Law and Courts and Community Law and Courts, The Nordic Conference on the European Union: Access to Justice, the Rule of Law and Due Process 6-8 November 1998* (Helsinki, 1999), p. 168.

⁷¹⁷ Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, Judgment of 13 July 2006, not yet reported, paras. 57-59. On this case, see below. With regard to the invocability of the Art. 81(2) EC nullity by third parties, see also *Béguelin*, *op.cit.*, para. 29; *Courage*, *op.cit.*, para. 22.

court's judgment has only a declaratory and not a constitutive character as to the voidness itself.⁷¹⁸

It is noteworthy that some national courts' judgments, notably of English courts, which speak of "transient voidness", seem to be incompatible with its automatic character. In *Passmore v. Morland*⁷¹⁹ the English Court of Appeal, affirming Laddie J., held that since the legality or illegality of an agreement under Article 81 EC is always dependent on surrounding economic circumstances that could change, the prohibition itself has a temporaneous or transient effect (*rebus sic stantibus*). The same transient nature should be attributed to the Article 81(2) EC nullity.⁷²⁰ Thus, if an agreement was prohibited and void at the time of its conclusion, the change of economic circumstances might render that agreement valid at a later time.⁷²¹ We submit, however, that this interpretation violates the Community law meaning of that provision and that, in any case, a preliminary reference to the European Court of Justice was called for.

According to the Court of Justice's case law the Article 81(2) EC nullity "is ... capable of having a bearing on all the effects, *either past or future*, of the agreement or decision [in question]".⁷²² While it is true that a certain conduct might cease to fall under the prohibition of Article 81 EC, the absolute and automatic character of the nullity sanction cannot be affected. Any other result would not be compatible with the *effet utile* of that provision and would not facilitate enforcement of aggrieved parties' rights under the doctrine of direct effect of Article 81 EC.⁷²³ In all cases of "transient prohibition", the contract, as initially concluded, will be void, although the conduct involved may no longer be prohibited. It is

⁷¹⁸ See Koutsoukis, "The Private Law Remedies for Infringement of Articles 85 and 86 EEC", in: *Studies in Honour of Andreas D. Loukopoulos* (Athens/Komotini, 1993) [in Greek], p. 318.

⁷¹⁹ *David John Passmore v. Morland plc. et al.* (CA), [1999] 1 CMLR 1129; [1999] EuLR 501.

⁷²⁰ See, in favour of such a transient nature of the voidness, Rodger, "The Interface between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment", 6 *Edin.LRev.* 217 (2002), pp. 233-234.; A. Kamerling and C. Osman, *Restrictive Covenants under Common and Competition Law* (London, 2004), pp. 292-293.

⁷²¹ For a Belgian case following the "transient voidness" logic see Cour d'appel de Bruxelles, 23-6-05, *Laurent Emond v. Brasserie Haecht*, in: http://europa.eu.int/comm/competition/antitrust/national_courts.

⁷²² *Brasserie de Haecht II*, *op.cit.*, para. 26; *Manfredi*, *op.cit.*, para. 57. See also Schröter, *supra* (2003), p. 312.

⁷²³ See in this sense the comment by Cumming, 21 *ECLR* 261 (2000), p. 264. Compare also the facts of the *Shaw and Falla* case, *op.cit.*, para. 200 *et seq.*, where the applicants had alleged that the Commission had erred in granting an individual exemption to an anti-competitive beer supply scheme, after having taken into account the subsequent intervention of circumstances, which, however, did not exist on the day of the conclusion of the contracts. Therefore, according to the applicants, the initial contracts were illegal at the date of their conclusion and invalid under Art. 81(2) EC, thus no exemption could be given to a void agreement notwithstanding the new circumstances. The CFI in its findings did not reject these arguments but found that the Commission had not really limited its assessment post-contractually and that it had also considered the agreements during the crucial time of their conclusion. This case, therefore, shows that the doctrine of transient voidness is probably not in line with EC competition law.

quite another issue whether a *new* valid contract can be considered to exist between the same parties, which will be operable ever since the prohibition of Article 81 EC has ceased to apply. However, in such a case the validity of the new contract will operate *ex nunc* and will affect neither the effects of the voidness of the initial contract, nor any possible claims for damages referring to the crucial time period of the contract's voidness.⁷²⁴

An interesting practical and theoretical question is the validity of agreements that fall under Article 81(1) EC yet were not notified to the Commission under the previous system of enforcement. Does this mean that, notwithstanding the introduction of the legal exception system with Regulation 1/2003, such agreements will now have to be considered invalid also for the period after 1 May 2004 without it being possible for a national court to examine them under Article 81(3) EC?⁷²⁵ We believe that the new system no longer calls for such a harsh solution. While, as we stressed above, the Article 81(2) EC nullity operates in principle both for the past and for the future, a national court now has full competence to examine whether an agreement that was not notified under the old system can nevertheless be saved under Article 81(3) EC. There is no reason to extend into the system of legal exception an unsatisfactory problem of the old system. There is no question of protecting the *effet utile* of the Article 81 EC prohibition by considering such agreements null for the future. While such a solution was appropriate for the previous system, it no longer makes sense.

Therefore, a national court dealing with an "old agreement", i.e. an agreement concluded before 1 May 2004, should no longer feel constrained to consider it invalid, if the agreement restricts competition in the Article 81(1) EC sense. Instead, it should examine whether the agreement can be saved through Article 81(3) EC. If Article 81(3) EC cannot save the agreement, then it would of course be null and void from the time of its conclusion. If, on the contrary, the agreement does benefit from Article 81(3) EC, the court should consider it valid without making any distinction for the period before 1 May 2004. There is no reason to follow a formalistic approach by favouring the agreement's nullity for the period before 1 May 2004, since this would essentially amount to honouring form rather than substance; indeed form that has been abandoned. We should stress that the question here is different from the question we describe above and that gave rise to the "transient voidness" theories. There, the issue is one of substance, i.e. the variance in time of the compatibility of an

⁷²⁴ See in this sense Libertini, "Autonomia privata e concorrenza nel diritto italiano", 100 Riv.Dir.Comm. 433 (2002), p. 450.

⁷²⁵ This problem is identified by Idot, "The Application of EC Competition Rules by national Courts: Remarks by a French Academic", Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005), pp. 4-5.

agreement with Article 81 EC as a whole, while here the issue is one of form, i.e. how to decide, now that the old notification system has been abandoned, on the validity of a non-notified agreement that would have always benefited from Article 81(3) EC.⁷²⁶

Occasionally, commentators refer to the exclusive competence of civil courts to apply Article 81(2) EC⁷²⁷ and criticise some Commission pronouncements, which tend to adduce from the illegality of an agreement its nullity. Such pronouncements give the impression that the Commission could also declare anti-competitive agreements void.⁷²⁸ Indeed, the Commission and also national competition authorities have in the past actually applied the civil sanction of nullity.⁷²⁹

It is indicative that while the draft Commission notice on the handling of complaints in paragraph 13 had included the statement that “*only* national courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 81 and 82”,⁷³⁰ the final text adopted is slightly - yet very tellingly - different: “National courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 81 and 82”. The deletion of the word “only” in the first part of that sentence seems to indicate that the Commission would rather not view the nullity question exclusively dealt with by the national courts.

In any event, to speak of exclusive competence on the part of national courts in this case would equally not be accurate. This would not be in conformity with the automatic character of the nullity. This automatic character means, indeed, that the parties can invoke the nullity of an anti-competitive agreement even extra-judicially, without it being necessary to seize a

⁷²⁶ Of course, the national court would consider the agreement null and void if it did not satisfy the conditions of Art. 81(3) EC at some point in the past before 1 May 2004, even though it may now do so. This is a problem of substance and our previous analysis on the retrospective and prospective nature of the nullity fully applies here, too.

⁷²⁷ See e.g. Ioannou, *supra* (1984), p. 434; Bernini, “Panel Discussion: Administrative/Prosecutorial Discretion of Antitrust Authorities Including: Leniency or Amnesty, Cooperation and Plea Bargaining, Positive Comity, and Allocation of Agency Resources”, in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 658; Favre, *supra* (2001b), p. 78; Schröter, *supra* (2003), p. 311; Van Gerven, *supra* (2003a), p. 54; Lenaerts and Gerard, *supra* (2004), pp. 320-321; Idot, *supra* (2004b), p. 160.

⁷²⁸ See Mail-Fouilleul, *supra* (2002), pp. 139-140, 154.

⁷²⁹ In Greece, see e.g. Opinion 8/III/2003 of 30 June 2003 of the Greek Competition Committee, in which the authority was requested to examine the civil validity of certain clauses in contracts for the sale of new automobiles. The Committee declared the nullity of some specific clauses, although it would have been preferable for it to determine the legality or illegality of the latter, rather than drawing itself the legal consequence of such illegality. See also Decision n° 288/IV/2005 of the Greek Competition Committee, with critical comments by Kinini, 11 *Dikaio Epicheiriseon kai Etairion* 1059 (2005) [in Greek], where the Greek authority actually declared the partial nullity of several clauses in a car distribution contract.

⁷³⁰ Emphasis added. The draft text was published in OJ [2003] C 243/30.

court. Any pronouncements of the Commission or of national competition authorities that an anti-competitive contract is null and void will not produce any more legal effects than their finding of illegality. The civil validity or invalidity of a contract is merely an *ex lege* consequence of its legality or illegality. Therefore, Commission decisions that declare the nullity of an illegal agreement cannot be said to be *ultra vires*, simply because the Commission in such cases states the obvious.⁷³¹ Of course, the Commission or a national competition authority, technically speaking, cannot “declare an agreement void”.⁷³² The Commission in such a case essentially examines the legality or illegality of the agreement with regard to Article 81 EC. On the other hand, a national court may be requested by a party to declare the nullity as such,⁷³³ which means that its judgment will be *res judicata* as to the nullity. Nevertheless, this is quite different from the view adopting the “exclusive competence” approach.

The nullity must be raised *ex officio* by the national court,⁷³⁴ unless the national procedural law applicable clearly does not allow the court to do so.⁷³⁵ According to the *Van Schijndel* case law, national courts are under a duty to raise *ex officio* questions of Community law, unless their national procedural law prohibits them from doing so.⁷³⁶

Another issue is whether the nullity is subject to prescription. A certain part of the theory considers the nullity of Article 81(2) EC not subject to any national regime of prescription,

⁷³¹ However, the Commission or an NCA would be acting *ultra vires*, if it were to apply the severability rule of the civil sanction of nullity. Compare Decision n° 288/IV/2005 of the Greek Competition Committee, mentioned above.

⁷³² See e.g. the Decisions of the French *Conseil de la concurrence* of 5-3-91 and of 6-11-01 in cases 91-MC-01 and 01-D-73, respectively, reported in and commented by Vogel, *supra* (2005), pp. 1627-1628.

⁷³³ See e.g. the *actions en nullité* in French and Belgian law.

⁷³⁴ See Koutsoukis, *supra* (1993), p. 319; Noirfalisse, “La Belgique”, in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. II, *Benelux and Ireland* (Baden-Baden, 1994), p. 79; Boulanger, *supra* (1997), p. 225; Erämetsä, *supra* (2001), p. 222; Iliopoulos, *supra* (2000), p. 251; Mail-Fouilleul, *supra* (2002), p. 138; Winckler, *supra* (2003), p. 124, fn. 15; Schröter, *supra* (2003), p. 311. The *ex officio* application of Art. 81(2) EC has also been recognised by national courts. See e.g. in Austria, OGH 23-5-96, 6 Ob 691/95, *Bierbezugsvertrag*, cited by Günther, *supra* (2001), pp. 356 and 394; in Belgium, Comm. Bruxelles, 30-6-67, *NV Canoy Herfkens Steenfabrieken v. Poncelet*, (1967) JCB 277; in Greece, Polymeles Protodikeio Athens n° 13118/1995, 47 *Epitheorisi Emporikou Dikaïou* 183 (1996), pp. 188-189.

⁷³⁵ In jurisdictions where the courts can raise *ex officio* questions pertaining to public policy (*moyens d'ordre public*), they must also do so with the nullity provision of Art. 81(2) EC, since Art. 81 is such a public policy rule. See e.g. Saint-Esteben, *supra* (1973), p. 286.

⁷³⁶ On the *ex officio* application of EC competition law by national courts see *infra*. It is noteworthy that in some areas other than competition law, such as in consumer protection, the Court of Justice has stressed that the nullity provisions, contained in secondary Community legislation aiming at the protection of consumers, must be raised *ex officio* by national courts. Thus, see cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocio Murciano Quintero and Salvat Editores SA v. José M. Sanchez Alcón Prades et al.*, [2000] ECR I-4941, paras. 26, 29; case C-473/00, *Cofidis SA v. Jean-Louis Fredout*, [2002] ECR I-10875, paras. 33-37.

since it is a notion of Community law and the latter does not determine this issue.⁷³⁷ This, however, would lead to an excessive degree of legal uncertainty, which would not comply with Community law. Therefore, there is no other option but to refer to national provisions on prescription, taking into account the public policy nature of EC competition law and the Community law principles of equivalence and effectiveness. Thus, the Article 81(2) EC nullity will be subject to a prescription that is applicable to the nullity of acts for violation of rules of public policy (*nullités d'ordre public*), or, if such a specific regime is absent, to the general national prescription regime applicable to civil actions, subject to the two limitations of Community law (equivalence and effectiveness).⁷³⁸

When the automatic nullity of anti-competitive agreements is invoked before a civil court by way of an objection to a claim based on civil law (usually on contract) or on unfair competition law, it blocks all eventual claims for performance or damages based on the illegal and void agreement or juridical act. Other consequences of the nullity are governed by national law.⁷³⁹ A specific question is whether national rules on unjustified enrichment can apply, so that a party to the void agreement that has performed thereunder can be restituted to the degree of the other party's enrichment.⁷⁴⁰ In some legal systems such claims are possible, while in others the rule *in pari delicto potior est conditio defendentis* prohibits restitution.⁷⁴¹

⁷³⁷ See Cienfuegos Mateo, "L'application de la nullité de l'article 85§2, du Traité CEE par les juridictions nationales (avec un examen particulier du domaine des transports aériens) : Conséquences dans l'ordre juridique interne", 27 CDE 317 (1991), pp. 322-323.

⁷³⁸ Compare the recent *Manfredi* ruling where the ECJ held that limitation periods for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC are subject to national law, but a short limitation period which is not capable of being suspended could make it practically impossible to exercise the right in damages and would thus offend against the principle of effectiveness (joined cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, Judgment of 13 July 2006, not yet reported, paras. 77-80). On this judgment, see below.

⁷³⁹ According to case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen GmbH & Co. KG*, [1983] ECR 4173, paras. 11-12, the consequences of the nullity on any orders and deliveries made pursuant to an anti-competitive and void agreement and on the resulting financial obligations are a matter for national law. See also cases T-185/96, T-189/96 and T-190/96, *Riviera Auto Service Établissements Dalmasso SA et al. v. Commission*, [1999] ECR II-93, para. 50.

⁷⁴⁰ Such claims should not be confused with restitutionary or damages claims of the victim of the anti-competitive agreement. The latter are the consequence of the harm caused by the anti-competitive agreement and derive not from the nullity provision of Article 81(2) EC, but directly from Article 81(1) EC, while the former refer to the harm caused by the sanction itself that EC competition law imposes, i.e. by the nullity.

⁷⁴¹ This rule is to be met also in English and in German law (§ 817(2) BGB). A similar provision exists in Spanish law (Art. 1306(2) of the Civil Code). However, no problem arises in Greek law, since the Greek Civil Code (Art. 917(2)), which otherwise follows the German BGB, excludes restitution of the enrichment only in case of *immoral* transactions. Recovery of sums paid is possible in Spain; see Audiencia Provincial de Girona (secc. n° 1), 10-6-04, *Clau SA v. Cepsa Estaciones de Servicio SA*, reported in *e-competitions*, December 2005 Vol. II. French law also allows for the restitution of such benefits pursuant to Art. 1376 CC (*action en répétition de l'indu*) (see further Boulanger, *supra* (1997), pp. 195-196). Therefore, a party to a void - pursuant to Art. 81(2) EC - contract has an obligation to restitute anything received under the contract, if this amounts to unjustified enrichment, unless the claimant bears most of the responsibility for the imposition of the anti-competitive clause or contract on the former (see Mail-Fouilleul, *supra* (2002), p. 157). Needless to say that

cc. The Legal Consequences of Nullity: Severance and Related Contracts

The automatic nullity in question only applies to those parts and clauses of the agreement that are affected by the prohibition. It applies to the agreement as a whole if it appears that those parts are not severable from the agreement.⁷⁴² The question of severance is to be decided under the applicable national law.⁷⁴³ In most legal systems, a void clause cannot be severed from the contract if the parties would not have concluded the latter in the absence of the former.⁷⁴⁴

The question arises as to the relationship between the validity of subsidiary or complementary contracts and the invalidity of the basic contract under Article 81(2) EC. Independent yet ancillary contracts, such as a liquidated damages or a penalty clause,⁷⁴⁵ directly aim at ensuring or securing the performance of the contractual obligations in question and constitute an inseparable whole with the basic agreement, thus following its fate in case of its voidness.⁷⁴⁶ It is, however, unclear whether this problem will be resolved according to Community or national law. It seems that this must be a question of Community law, since

such claims can be set off against possible damages claims of the other party with regard to harm resulting from the anti-competitive agreement.

⁷⁴² *Société Technique Minière, op.cit.*, at 250. Under EEA law the severability of parts of an agreement that fall under Art. 53(1) EEA is also a question of national law (case E-7/01, *Hegelstad Eiendomsselskap Arvid B. Hegelstad et al. v. Hydro Texaco AS*, [2002] Report of the EFTA Court 312, para. 43). Note that the question whether the nullity of Art. 81(2) EC is partial or total is a question of Community law, whereas the question of severability of a specific illegal clause is one of national law. See also Schröter, *supra* (2003), p. 313.

⁷⁴³ The question of severability for the purpose of Art. 81(2) EC has to be distinguished from the severability of clauses imposing obligations that are not block-exempted by Regs. 2790/1999 on vertical agreements, 1400/2002 on motor vehicle distribution and 772/2004 on technology transfer agreements. Under Art. 5 of these three Regulations some non-hard core restrictions of an agreement do not enjoy the benefit of the block exemption, but at the same time do not deprive the remaining clauses of the agreement of that benefit, if they are severable. This specific kind of severability is a question of the *lex causae*. See Whish, *supra* (2000a), p. 917, fn. 137; Jones and Sufrin, *supra* (2004), p. 672; Ritter, "The New Technology Transfer Block Exemption under EC competition Law", 31 LIEI 161 (2004), p. 167; Fine, "The EU's New Antitrust Rules for Technology Licensing: A Turbulent Harbour for Licensors", 29 ELRev. 766 (2004), p. 783, fn. 85.

⁷⁴⁴ Nevertheless, the possibility of divergence among national legal systems as to the result of severance cannot be excluded. This is regretted by some authors, who see the potential of forum shopping. See e.g. Furse, *supra* (2000), p. 137; Jones and Sufrin, *supra* (2004), pp. 1199-1200.

⁷⁴⁵ For example a "profit pass-over clause" which might be included in a distribution contract. According to such clauses the distributor that has made sales in the pre-assigned geographical area of another distributor is bound to compensate the latter with a fixed sum of damages. See also Winckler, *supra* (2003), pp. 125-126, fn. 23, on a case regarding a similar "penalty pure and simple in case of non-delivery".

⁷⁴⁶ See Koutsoukis, *supra* (1993), p. 322; Boulanger, *supra* (1997), p. 293; Schröter, *supra* (2003), pp. 314-315.

the underlying question is not the subsidiary character of such contracts, but rather whether the latter are affected by the prohibition of Article 81 EC.⁷⁴⁷

An exception is the fate of an arbitration clause/agreement, which is such an independent yet subsidiary contract.⁷⁴⁸ Under the principle of autonomy or separability of the arbitration agreement, which is accepted in all European and in most foreign legal systems, the arbitration clause will be intact,⁷⁴⁹ and, indeed, the arbitrators will examine the question of applicability of Article 81(2) EC to the main contract. Only in exceptional circumstances could the voidness of the main contract and its incompatibility with Article 81 EC catch the arbitration clause, too. As we explain in the pertinent part, the function of an arbitration clause in an anti-competitive agreement may be such as to increase the competition-restraining function of the unlawful practice. In such a case the arbitration clause itself will also be illegal and void under Article 81(2) EC.⁷⁵⁰

Another issue is the influence of the nullity of the main contract to other independent, yet consequential or follow-on contracts (*Folgeverträge*), which are concluded with third parties and *indirectly* aim at giving effect to the obligations undertaken under the main contract in question. Such will be contracts for the lease of premises, employment contracts, and other contracts for the supply of raw materials, for the sale of products, or for the transfer of property rights.⁷⁵¹ Since these contracts do not restrict competition by themselves, they will not be affected by the voidness sanction of Article 81(2) EC,⁷⁵² unless they are part and parcel of a network of competition-restraining agreements that also includes the main illegal contract. The same would be the result if such agreements are consequential to an illegal concerted practice or decision by an association of undertakings. In such cases Community

⁷⁴⁷ According to the ECJ, "any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law" (*Société Technique Minière, op.cit.*, at 250, emphasis added).

⁷⁴⁸ Some authors speak of "severance" of the arbitration clause from an illegal agreement (see Braun, *supra* (1996), p. 576). Such terminology should be avoided, firstly because the arbitration clause is a separate and independent agreement from the main contract and not a "clause" that can be severed, and secondly because the concept of "severance" is used in the context of illegal clauses that can be severed from an otherwise legal agreement and not of legal clauses severable from an illegal agreement.

⁷⁴⁹ This is sometimes missed by competition literature, which tends to include the arbitration clause into the affected contracts. See e.g. Koutsoukis, *supra* (1993), p. 322.

⁷⁵⁰ On this question, reference is made to the more detailed analysis *infra*.

⁷⁵¹ See Koutsoukis, *supra* (1993), pp. 322-323.

⁷⁵² See Schröter, *supra* (2003), p. 315, who senses here a certain weakening of the effectiveness of the prohibition, which national courts are bound to avoid under Art. 10 EC. See also AG Warner's Opinion in case 22/79, *Greenwich Film Production v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM) and Société des Éditions Labrador*, [1979] ECR 3275, at 3296: "[N]ot every transaction or legal relationship having a connexion with an agreement, decision or concerted practice prohibited by [Article 81] is necessarily void. For instance in the case of a price-fixing cartel, sales by members of the cartel to customers are not void even if made at the prices illegally fixed."

law will become of issue, if these consequential contracts, usually intellectual property licences, are affected by the prohibition of Article 81 EC by giving effect to the anti-competitive agreement or practice itself (*Ausführungsverträge*).⁷⁵³

We should finally mention that the parties to the contract can include separability clauses in their contracts whereby it is provided that the nullity of a particular clause because of its contrariety with competition law does not invalidate the contract as a whole. Separability clauses (*salvatorische Klauseln*) raise concerns when clearly aiming at saving specific anti-competitive clauses. In such cases they may become tainted themselves by the illegality, if their aim is clearly to frustrate the voidness sanction and to facilitate the illegality. Thus, while national courts have in principle accepted the legitimacy of such general clauses, they have at the same time considered that clauses specifically designed to circumvent the Article 81(2) EC nullity and essentially to relieve the parties from any risk of illegality, would be illegal and thus void on competition law grounds.⁷⁵⁴

dd. Nullity under Article 82 EC

It is noteworthy that there is no equivalent Treaty provision on the voidness of agreements or other juridical acts that violate Article 82 EC.⁷⁵⁵ The explanation usually given is that this was a conscious choice, since the abuse of a dominant position, unlike cartels, does not typically rely on legal agreements, but rather on factual situations. However, the conduct prohibited by Article 82 EC may, indeed, take the form of agreements or other juridical acts that are capable of producing legally enforceable rights and obligations. Such agreements or

⁷⁵³ In case C-9/93, *IHT Internationale Heiztechnik GmbH and Uwe Danziger v. Ideal-Standard GmbH and Wabco Standard GmbH*, [1994] ECR I-2789, the Court dealt with certain assignments of trademarks that followed an anti-competitive (market-sharing) agreement. The Court held that "where undertakings independent of each other make trade-mark assignments following a market-sharing agreement, the prohibition of anti-competitive agreements under Article [81] applies and assignments which give effect to that agreement are consequently void. However, ... that rule and the accompanying sanction cannot be applied mechanically to every assignment. Before a trade-mark assignment can be treated as giving effect to an agreement prohibited under Article [81], it is necessary to analyse the context, the commitments underlying the assignment, the intention of the parties and the consideration for the assignment" (para. 59). See also the facts of case 28/77, *Tepea BV v. Commission*, [1978] ECR 1391, paras. 33-34, where agreements granting exclusive rights to use a trademark were in fact giving effect to exclusive distribution agreements offering absolute territorial protection excluding all parallel imports, thus being subject to Art. 81(1) EC themselves.

⁷⁵⁴ Thus, the German Supreme Court (BGH) has established that, as a matter of principle, a separability or "salvatory" clause that contravenes the scope (*Schutzzweck*) of the prohibition of Art. 81 EC or the equivalent national provision, will be null. The prohibition and nullity of anti-competitive agreements cannot be circumvented through the inclusion of such a clause into the contract on purpose: see BGH, 8.2.94, KZR 2/93 – *Pronuptia II*, 44 WuW 547 (1994).

⁷⁵⁵ Some national competition laws, however, although inspired by the Community model, contain specific provisions on the nullity of acts that constitute an abuse of a dominant position (e.g. Art. L420-3 of the French *Code de commerce*; see also the more specific Art. 442-6(2)).

legal acts will have to be considered void, otherwise one would be led to the paradox of a prohibited and illegal conduct punished through severe administrative sanctions, which would nevertheless give rise to rights and obligations enforceable through civil law.

Therefore, the question arises as to the Community or national law character of such a nullity.⁷⁵⁶ While it is true that eventual agreements or other legal acts that are incompatible with Article 82 EC will be considered illegal and, therefore, void under national law,⁷⁵⁷ one cannot exclude discrepancies that compromise the effectiveness of the nullity of such acts and by implication of the Article 82 EC prohibition. Such discrepancies do not serve the aim of the uniform and consistent application of EC competition law.

To give an example of the risk of discrepancies arising as a result of the application of national law, under German and Greek law, contracts that are incompatible with a legal prohibition will be null "unless the law provides otherwise".⁷⁵⁸ There are two legal problems involved here. The first and least difficult is whether Article 82 EC is such a legal prohibition. The answer to this question is positive.⁷⁵⁹ The second and more complex legal problem is whether all contracts falling foul of Article 82 EC will be considered void, or whether "the law provides otherwise" in some cases.⁷⁶⁰ This has given rise to different theories in Germany with some authors in favour of the outright nullity of such agreements and others in favour of their validity, unless the contract in question, apart from introducing, complementing, or otherwise supporting the abuse of a dominant position, also contradicts *bonos mores*.⁷⁶¹ Under French and Italian law, on the other hand, the nullity of such contracts is outright and derives from the general provisions of the respective Civil Codes, because of the illegal character of the contracts and of their contrariety with a rule of mandatory nature (such as Article 82 EC is) and the notion of public policy (*ordre public*).⁷⁶²

⁷⁵⁶ The legal basis of the nullity of contracts incompatible with Art. 82 EC has not attracted substantial analysis so far. Most commentators tend to accept that this is a matter for national law. See e.g. Lenaerts and Gerard, *supra* (2004), p. 314, fn. 4.

⁷⁵⁷ See e.g. Iliopoulos, *supra* (2000), pp. 251 and 303; Mail-Fouilleul, *supra* (2002), p. 140, fn. 993; Winckler, *supra* (2003), p. 121.

⁷⁵⁸ S. 134 BGB and Art. 174 of the Greek Civil Code respectively.

⁷⁵⁹ See Koutsoukis, *op.cit.* (1993), p. 346.

⁷⁶⁰ In this respect, it can be argued that the law "provides otherwise" by providing for detailed administrative sanctions (or even criminal sanctions, at least in Member States that impose such sanctions for violations of EC competition law).

⁷⁶¹ Thus being contrary to § 138 BGB and to Arts. 178-179 of the Civil Code, in German and Greek law, respectively (see L.E. Kotsiris, *Competition Law (Free and Unfair)* (Athens/Thessaloniki, 2000) [in Greek] p. 543). A third, more nuanced, approach is in favour of the nullity, unless in exceptional circumstances the latter does not serve the effectiveness of the Art. 82 EC prohibition.

⁷⁶² On France, see Arts. 6 and 1131 *Code Civil*; see further Winckler, *supra* (2003), p. 122. On Italy, see Tesauro, "Competition Authorities and Private Rights", in: Andenas, Hutchings & Marsden (Eds.), *Current Competition Law*, Vol. II (London, 2004), p. 185.

However, we submit that any difference of treatment of the nullity under Articles 81 and 82 EC must not have been intended. The Treaty did not contain a specific provision on nullity in Article 82 EC only because the prohibited behaviour therein does not usually take the form of an agreement. In those exceptional circumstances, where an agreement or any other juridical act introduces, complements or supports the abuse of a dominant position, it must be accepted that under *Community* law such an agreement or act will be void. This comes by way of analogy with Article 81(2) EC.⁷⁶³ Any other interpretation would be incompatible with the “system” of the two basic competition rules of the Treaty and might impair the effectiveness and efficiency of Article 82 EC. As we have shown, the delegation of the issue of nullity to national law can be in some cases detrimental to the consistent enforcement of the Treaty competition rules. Therefore, agreements falling under Article 82 EC will be considered void, the voidness being automatic, no prior decision to that effect being required.⁷⁶⁴ Indeed, the recent judgment of the Swedish Supreme Court in the *Luffartsverket* case followed exactly this approach and, relying on Articles 82 and 10 EC, concluded that an agreement in breach of Article 82 EC is null and void, this flowing directly from that Community provision.⁷⁶⁵

A sensitive issue, however, regards the absolute or relative character of this voidness. While prohibited agreements that introduce or otherwise support an abuse of a dominant position will be void and unenforceable by the dominant undertaking, the rights of parties, which are the victims of the abuse of the former should be protected. In *Greenwich Film Production*, the Advocate General had touched upon this question and stressed that “it would be unthinkable that Article [82] should be used indiscriminately to avoid contracts in a manner detrimental to the victims of the abuse or to third parties”.⁷⁶⁶ Thus, it seems that the nullity of an agreement that infringes Article 82 EC cannot operate to the detriment of the victim of the abuse, when it operates to protect the latter from exploitation.⁷⁶⁷

b. Damages Actions

⁷⁶³ Nullity by analogy has also been accepted with regard to agreements that introduce or otherwise support an abuse of a dominant position in national competition laws. Thus, under Italian competition law such agreements would be null by analogy of Art. 9(2) of the *Legge 18 giugno 1998, n. 192* that declares the nullity of contracts, through which an abuse of economic dependence is realised. See further Libertini, *supra* (2002), p. 456.

⁷⁶⁴ Compare also Art. 1 Reg. 1/2003, which makes no distinction in prohibiting agreements falling under Arts. 81(1) and 82 EC. Of course, the value of this provision is merely declaratory, since it is the Treaty provisions themselves and their direct effect that lead to the same result.

⁷⁶⁵ See Bernitz, “The *Arlanda Terminal 2* Case: Substantial Damages for Breach of Article 82”, 2 Comp.LJ 195 (2003), p. 197.

⁷⁶⁶ AG Warner’s Opinion in *Greenwich Film Production*, *op.cit.*, [1979] ECR 3275, at 3296.

⁷⁶⁷ See in this sense Jones and Sufrin, *supra* (2004), p. 1203.

aa. From Inexistence to the Awakening of EC Private Enforcement

Damages actions have personified private antitrust enforcement, particularly if one studies the oldest and most developed antitrust system of the world. Their primary aim is to compensate victims of anti-competitive practices but they also increase the overall deterrent effect of the law. In addition, defendants themselves become instrumental in implementing the competition rules and the general level of compliance with the law is raised.⁷⁶⁸

It has long been debated why Europe is left so far behind to the extent that one can even totally ignore the role of damages actions and awards in view of their practical inexistence.⁷⁶⁹

According to former Advocate General Van Gerven, who has been an instrumental personality for the enhancement of EC private antitrust enforcement, the underdevelopment of private actions in Europe is due to a variety of obstacles, notably the following:⁷⁷⁰

- (a) absence of an express statutory basis for bringing EC competition law-based suits;
- (b) institutional problems, basically lengthy proceedings and absence of specialisation of national courts;
- (c) limitations on standing and on the aggregation of damages claims;
- (d) difficulties in proving causation and the extent of harm;
- (e) uncertainty as to the existence and scope of the so-called “passing-on” defence;
- (f) existence of contributory fault-related defences;
- (g) uncertainties as to the calculation of damages and as to their scope (i.e. whether they should only compensate the harm or also aim at restituting to the victim the illegal gains);
- (h) absence of punitive damages;
- (i) short limitation periods
- (j) problems in fully recovering costs and fees;
- (k) absence of contingency fees;
- (l) restrictive and antiquated evidence rules

⁷⁶⁸ See above on the general qualities of private enforcement and on the “private attorney-general” model.

⁷⁶⁹ See e.g. Meade, *supra* (1986), p. 111; Kon, “The Commission’s White Paper on Modernization: The Need for Procedural Harmonisation”, in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 247; Harding and Joshua, *supra* (2003), p. 239. See also Monopolkommission, *Sondergutachten von 30-10-01 gemäß § 44 Abs. 1 Satz 4 GWB, Folgeprobleme der europäischen Kartellverfahrensreform*, para. 66.

⁷⁷⁰ See Van Gerven, “Private Enforcement of EC Competition Rules”, Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005), p. 1.

(m) lack of binding effect of competition authorities' infringement decisions.

One may agree or disagree with the characterisation of some of these parameters as obstacles to private enforcement, yet it is clear that the EU compares very poorly with the US in this regard. This may not be, of course, a cause of concern, since the US system of private enforcement is not universally admired in all its details. Indeed, there has long been a powerful current in the US to restrict private antitrust enforcement because of its excesses.⁷⁷¹ The problem, however, in Europe is that there has been almost total inexistence of private enforcement. The aim should be to reverse that, without importing the US excesses. It is therefore inappropriate to resist the introduction and enhancement of private enforcement in Europe merely because of the US problems. Indeed such a line of argument would not be very different from totally denying a developing country the possibility to industrialise itself on environmental grounds.

To the long list of deficits presented by former Advocate General Van Gerven, one may add the supranational, multilingual and multi-jurisdictional structure of Europe and the state of its competition legal profession. Thus, firstly, unlike the case of the US, there is no system of "federal" courts of full jurisdiction in Europe where "federal" claims based on EC competition law could be brought. Secondly, the Europeans avail themselves of neither a common language nor a common or at least a similar legal tradition. Thirdly and most importantly, the competition legal profession is still utterly oriented towards public enforcement. The Brussels-based bar is not moved by the idea of a developed system of private enforcement, because this would mean loss of business which would necessarily be redirected to the Member States (in the absence of centralised or even decentralised Community courts of general jurisdiction). At the same time, the nationally-based lawyers usually lack the experience of Community or antitrust litigation and see rather suspiciously the introduction of a foreign body into their national legal traditions. Meanwhile, other interlocutors that could be instrumental in favouring private antitrust enforcement, such as consumer groups, remain rather disinterested, since they prefer employing other tools that are dearer and more familiar to them, such as consumer protection laws.

This state of malign or benign neglect can, however, no longer be allowed to continue. Apart from being detrimental to an efficient competition law enforcement based on economic actors' constant awareness of the severe risks if they break the law, it is also incompatible with Community law in general, since the rights that Articles 81 and 82 EC grant to

⁷⁷¹ See e.g. Wils, *supra* (2003), p. 485 *et seq.*

individuals become essentially a dead letter, or *Papierrecht*, at least as far as national civil litigation is concerned. Indeed, this constitutional parameter was not missed by the ultimate federator in Europe, the European Court of Justice, which in a powerful ruling of principle in 2001 decided that as a matter of Community law damages should be available to any victim of anti-competitive conduct and that the existence of such a right strengthens the working of the Community competition rules and discourages their breach, thus making "a significant contribution to the maintenance of effective competition in the Community".⁷⁷²

The *Courage* ruling set the principle of Community law-based individual civil liability for antitrust violations in an undeniable way and gave the Commission the appropriate legitimacy to proceed to detailed and groundbreaking proposals to adopt secondary Community legislation on damages claims, thus enhancing – if not indeed introducing – private antitrust enforcement in Europe.⁷⁷³ It is not clear whether in the absence of *Courage* the Commission would have been able to attempt such an over-reaching project.

bb. The Brussels Way to *Courage*

The Treaty of Rome did not include a provision on the award of damages to victims of anti-competitive practices, unlike US antitrust law and some European national competition laws.⁷⁷⁴ At the time of the introduction of Regulation 17/1962 the Deringer Report for the European Parliament had accepted the desirability and necessity of private actions for the effective enforcement of EC competition law and had proposed a study of the national laws

⁷⁷² *Courage*, *op.cit.*, para. 27. See below for a thorough analysis of this case.

⁷⁷³ On the Commission's Green Paper on damages, see below.

⁷⁷⁴ S. 7 of the original Sherman Act, superseded by s. 4 of the Clayton Act. The fact that some national competition laws may not mention the possibility of damages actions is not conclusive, since it is usually through the general provisions of civil law (usually in tort or exceptionally in contract) that such actions will be possible. For examples of national competition laws expressly mentioning the possibility of damages actions, see s. 33 of the German Competition Act (GWB); s. 14(5)(b) Irish Competition Act of 2002; Art. 12(1)(b) of the Swiss Act on Cartels and Other Restraints of Competition (KartG) of 1995; Art. 13(2) of the Spanish Act for the Protection of Competition (LDC) of 1989 (as subsequently amended); Art. 33(1) of the Swedish Competition Act of 1993 (as subsequently amended); and Art. 18a of the Finnish Act on Competition Restrictions of 1992 (as subsequently amended). Compare also Art. 33(2) of the Italian *Legge 10 ottobre 1990, n. 287 (Norme per la tutela della concorrenza e del mercato)*, where the possibility of damages claims is implicitly accepted, and, in France, Art. L442-6 *Code de commerce*, which is of more limited scope and provides for a specific legal basis for damages claims in case of harm caused by the commission of certain enumerated acts. It should be noted that these national laws are no longer exceptional, in that national competition laws adopted or amended in the post-modernisation era increasingly contain express provisions on damages actions. Finally, reference should also be made to the 2000 UNCTAD *Model Law on Competition*, which favours under the Title "Possible Elements for Article 12: Actions for Damages" legal actions for the recovery of the amount of a loss or damage that a person or enterprise suffers by an act or omission in violation of competition law.

of the then Six in order to identify the relevant issues for further action.⁷⁷⁵ Indeed, in 1966 the Commission published a specific study examining the remedies in national laws for damage caused by the infringement of the Treaty competition rules.⁷⁷⁶

Thereafter, there was a long period, in which the Commission was rather silent on that matter.⁷⁷⁷ This may be explained by the Commission's desire to retain as much control as possible over antitrust enforcement at these early stages.⁷⁷⁸ After the very important rulings in *Delimitis* and *Automec II* the Commission adopted in 1993 its Notice on co-operation with national courts, which, admittedly, aimed at the more procedural aspects of the enforcement of the competition rules by national courts and its co-operation with them, but nevertheless also touched on the issue of substantive remedies in national courts. The Notice, being the product of a soft law approach, was certainly not the ideal instrument to deal with this sensitive matter, since it did not bind national courts.⁷⁷⁹

With reference to the specific issue of national remedies, the Notice was criticised as timid and conservative.⁷⁸⁰ On the one hand, emphasis was placed on the importance of damages awards, since "companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interest in such an event",⁷⁸¹ but on

⁷⁷⁵ See Assemblée parlementaire européenne, Documents de Séance 1961-1962, *Rapport Deringer*, 7 septembre 1961, Document 57, para. 123. See also Deringer and Tessin, "Das erste Kartellgesetz des Gemeinsames Marktes", 15 AWD (1962) 989, p. 993.

⁷⁷⁶ See *La réparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE*, Série Concurrence No. 1 (Bruxelles, 1966). The conclusions of that study were that in principle existing national laws of the then Member States were in a position to provide for remedies in antitrust violations. See further, Jacobs, *supra* (1987), p. 227.

⁷⁷⁷ See also European Commission, *XIIIth Report on Competition Policy - 1983* (Brussels, 1984), pp. 135-136, where the Commission cautioned against the erroneous but widespread notion that the then Articles 85 and 86 EEC could only be enforced by it, stressing the practical advantages of private antitrust enforcement in national courts and the desirability "that the judicial enforcement of Articles 85 and 86 should also include the award of damages to injured parties, because this would render Community law more effective". On these early attempts of the Commission to sensitise private litigants as to private antitrust enforcement and damages, see Verstrynge, "Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy", in: Hawk (Ed.), *Antitrust and Trade Policies in International Trade 1984, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1985), pp. 686-687. According to Temple Lang, *supra* (1999), p. 267, the Commission during Commissioner Sutherland's mandate (1985-1989) had considered the possibility of proposing a regulation on the application of EC competition law by national courts, but the reactions of national legal experts were discouraging. Indeed, the then Commissioner alluded to such an initiative by referring to a study that the Commission had prepared on damages and interim measures available under national law for breach of Articles 81 and 82 EC: see Sutherland, "EEC Enforcement Policy: Recent Developments and Future Prospects", in: Hawk (Ed.), *United States and Common Market Antitrust Policies 1986, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1987), p. 337.

⁷⁷⁸ This is the view e.g. of Jones and Sufrin, *supra* (2004), p. 1190.

⁷⁷⁹ See criticism in this respect by Von Meibom and Zinsmeister, "Verbesserung der europäischen Wettbewerbsverfahren", in: *Schwerpunkte des Kartellrechts 1991/92, Verwaltungs- und Rechtsprechungspraxis, Referate des 20. FIW-Seminars 1992 und der 11. Brüsseler Informationstagung 1992* (Köln/Berlin/Bonn/München, 1993), p. 62.

⁷⁸⁰ See e.g. Wesseling, *supra* (2000), pp. 198-200.

⁷⁸¹ 1993 co-operation Notice, para. 16.

the other hand, all references to remedies were seen in the light of national rather than of Community law.⁷⁸² Surprisingly enough, there was an unfortunate reference to one of the *Rewe* cases which states that the Treaty did not intend to create new remedies at the national level to ensure the observance of Community law other than those already laid down by national law.⁷⁸³ This specific case has widely been considered superseded by subsequent case law of the Court of Justice.⁷⁸⁴ Even more surprisingly, the Notice seemed to content itself with the principle of equality of treatment or non-discrimination, thus ignoring the second and most important Community law limit to national remedial/procedural autonomy, which is the requirement that the national rules in question must not make it impossible in practice to exercise effectively the relevant Community right (principle of adequacy/effectiveness).⁷⁸⁵

The 1999 White Paper on modernisation placed the whole issue of the application of the Treaty competition rules by national courts on an entirely different basis. In particular, the question of damages awards by national courts seemed to be quite central to the mind of the Commission. The Commission recognised that national courts, whose task is to protect the rights of individuals, “*can grant damages and order the performance or non-performance of contracts [and] are the necessary complement to action by public authorities*”.⁷⁸⁶ However, all relevant references did not expound on the damages’ possible Community or national legal basis. It is noteworthy that this rather reserved approach was also followed post-*Courage* in Regulation 1/2003, which states in Recital 7 that national courts “have an essential part to play in applying the Community competition rules” and that “when deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements”. Be it as it is, both the White Paper and Regulation 1/2003 do not miss the effectiveness point.

Nevertheless, as already mentioned, modernisation and decentralisation did not result in harmonisation of national sanctions or remedies. At that stage, it was thought that the general principles of Community law under the supervision of the Court of Justice were sufficient

⁷⁸² See also European Commission, *Dealing with the Commission, Notifications, Complaints, Inspections and Fact-finding Powers under Articles 85 and 86 of the EEC Treaty* (Brussels/Luxembourg, 1997), p. 11, where the same rather timid approach is followed.

⁷⁸³ 1993 co-operation Notice, para. 10. The reference is to case 158/80, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel (Butter-buying Cruises)*, [1981] ECR 1805. At the time of the co-operation Notice it would have been much more preferable to cite the *Rewe/Comet* formula (see above), as further expounded by subsequent case law.

⁷⁸⁴ See Shaw, *supra* (1995), p. 132. See also below.

⁷⁸⁵ See *supra*.

⁷⁸⁶ See p. 5 of the Explanatory Memorandum preceding the text of the regulation proposal (emphasis added). For other references to the national courts’ power to grant damages see paras. 46 and 100 of the White Paper, and the article-by-article Explanatory Memorandum preceding the regulation proposal, under Art. 6.

safeguards. This minimalist approach was up to a certain degree justified, although the discussions that followed made clear that, at least as far as private antitrust enforcement is concerned, no boom in Europe was to be expected, without a minimum of harmonisation of some national substantive and procedural rules.⁷⁸⁷

cc. The Luxembourg Way to *Courage*

Going now to the context of the Court of Justice, we have to note that during all that period until 2001 the Court never had the opportunity to rule on the issue of civil liabilities arising from the violation of EC competition rules, although in some instances it has referred to possible damages and other civil claims that private parties can pursue before national courts,⁷⁸⁸ without however touching upon the question of the Community or national legal basis.⁷⁸⁹

Outside the area of competition law, however, the Court incrementally imposed severe limits on national institutional and remedial/procedural autonomy, firstly stressing the Community law requirements of non-discrimination/equality and adequacy/effectiveness and ultimately recognising the existence, as a matter of Community law, of Community remedies available to individuals.⁷⁹⁰ Thus, there was an impressive development from the early case law, where it was stated that Community law imposed no duties on national laws and courts to introduce new remedies,⁷⁹¹ to a more pro-active approach notably with rulings dealing with remedies in

⁷⁸⁷ This was the general conclusion of the majority of the participants in the Florence Sixth EU Competition Law and Policy Workshop of 1-2 June 2001 (see C.D. Ehlermann & I. Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003). See also Basedow, "Who Will Protect Competition in Europe?: From Central Enforcement to Authority Networks and Private Litigation", in: Einhorn (Ed.), *Liber Amicorum E.J. Mestmäcker*, 2 EBOR (2001) 443 *et seq.* Compare in this regard the initial cautious position of Ehlermann as to the need of further harmonization (Ehlermann, *supra* (2000a), pp. 582-583 and 586) and his subsequent opinions advocating the need of additional initiatives in the area of national substantive and procedural law (Ehlermann and Komninos, *supra* (2001), p. 782 *et seq.*).

⁷⁸⁸ This was already implicit in *BRT v. SABAM I*, *op.cit.*, paras. 16 and 22. Reference should also be made to case C-242/95, *GT-Link A/S v. De Danske Statsbaner*, [1997] ECR I-4349, para. 57; case C-282/95, *Guérin Automobiles v. Commission*, [1996] ECR I-1503, para. 39.

⁷⁸⁹ It is noteworthy that the CFI in *Automec II*, *op.cit.*, para. 50, had expressed itself in favour of the national law basis of such claims: "The other consequences attaching to an infringement of Article [81] of the Treaty [apart from the nullity of Article 81(2)], such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract ... are to be determined under national law." It is beyond the scope of this study to explain the occasional failures of the CFI to grasp the more general picture of Community law in some of its rulings on competition law. See also below on the CFI's ruling in *Atlantic Container*, which, in our view, misread *Courage*.

⁷⁹⁰ See above.

⁷⁹¹ *Butter-buying Cruises*, *op.cit.*

the fields of social policy and sex discrimination,⁷⁹² interim protection,⁷⁹³ and ultimately state liability for breaches of EC law.⁷⁹⁴ In particular, the Community principle of state liability for breaches of EC law by Member States, established in *Francovich*, increasingly led commentators to argue that a right in damages in cases of EC competition law infringements was a matter of EC and not of national law. It was thought that there was no compelling reason to differentiate between state and individual liability for damage caused by infringements of Community law, since the basis for such liability, which is the principle of *effet utile* or effectiveness of Community law, is not affected by the identity of the perpetrator, i.e. whether it is the state or individuals.⁷⁹⁵

Meanwhile, a powerful boost to that line of argument was given in 1993 by Advocate General Van Gerven in his Opinion in *Banks*,⁷⁹⁶ in which he argued extensively in favour of recognising a Community right to obtain reparation in respect of loss and damage sustained as a result of an undertaking's infringement of the directly effective Community competition rules.⁷⁹⁷ The Advocate General in his carefully structured Opinion considered that the general basis established by the Court in *Francovich* also applied to the case of "breach of a right which an individual derives from an obligation imposed by Community law on another individual".

"The full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law - all the more so, evidently, if a directly effective provision of Community law is infringed."⁷⁹⁸

⁷⁹² See e.g. case 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891; case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990] ECR I-3941; case C-271/91, *M.H. Marshall v. Southampton and South West Hampshire Area Health Authority (II)*, [1993] ECR I-4367 (the latter decided after the publication of the 1993 co-operation Notice). All these cases stressed the principle according to which sanctions for enforcement of Community law must be able to guarantee real and effective judicial protection to the discrimination victim and must have a real deterrent effect on the employer that has breached the pertinent rules.

⁷⁹³ See in particular *Factortame I*, *op.cit.* See, with regard to this case, V.A. Christianos, *Overruling of Prior Judgments in the Case Law of the Court of Justice of the European Communities* (Athens/Komotini, 1998) [in Greek], p. 69, speaking in this context of a clear case of departure from the *Butter-buying Cruises* case.

⁷⁹⁴ Cases C-6/90 and C-9/90, *Andrea Francovich et al. v. Italy*, [1991] ECR I-5357; *Brasserie du Pêcheur/Factortame III*, *op.cit.*

⁷⁹⁵ For the first attempts to deduce a Community principle of individual civil liability in EC competition law cases from *Francovich*, see Smith, "The *Francovich* Case: State Liability and the Individual's Right in damages", 13 ECLR (1992) 129, p. 132; Hoskins, "Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules", 13 ECLR (1992) 257, p. 259.

⁷⁹⁶ Case C-128/92, *op.cit.*

⁷⁹⁷ *Banks*, *op.cit.*, AG's Opinion, paras. 37 *et seq.*

⁷⁹⁸ *Op.cit.*, para. 43.

In competition law, in particular, the Advocate General observed that such a Community right in damages would make the Treaty antitrust rules “more operational”, adducing an argument from the US system of antitrust enforcement, where civil suits for damages have played a dominant role.⁷⁹⁹ Interestingly enough, he then went on to draw “detailed rules governing an action for damages in respect of breach of the rules of Community law” and, more specifically, “uniform conditions of liability”, relying on the Court’s case law on the non-contractual liability of the Community (Article 288(2) EC).⁸⁰⁰

In *Banks*, however, the Court declined to address all these fundamental issues, because it reached the conclusion that the only applicable set of rules to the facts, Articles 65 and 66 ECSC, did not have direct effect.

Notwithstanding this missed opportunity, the advocates of a Community remedy of damages for antitrust violations drew further support from the progressively more elaborate jurisprudence of the Court of Justice on state liability, notably in *Brasserie du Pêcheur/Factortame III*, but also from the Court’s shift towards a more remedies-oriented case law, where effective judicial protection acquired a central role, as a complement of or corollary to the fundamental principle of direct effect. In 1999, a groundbreaking monograph written by Clifford Jones persuasively argued in favour of a private enforcement system in Europe, after demolishing many of the misconceptions of European scholars as to the exceptionality and non-transposability of the mature US system of private antitrust enforcement.⁸⁰¹ A point central to that study was the view that there was a right under EC law allowing to claim damages from undertakings which have violated Articles 81 and 82 EC, in the line of the *Francovich* and *Brasserie du Pêcheur/Factortame III* judgments. This monograph was to be quite influential with the Court of Justice.

dd. *Courage v. Crehan*: The Celebration of a Community Right in Damages

The fundamental issue of the Community or national law basis of the right in damages in EC competition law violations was finally addressed by the Court of Justice in its *Courage* ruling

⁷⁹⁹ *Op.cit.*, para. 44.

⁸⁰⁰ *Op.cit.*, paras. 46 *et seq.* According to AG Van Gerven there were three conditions for liability in damages to arise: damage, causal connection between breach and ensuing damage, and illegality of the conduct alleged. It should be stressed that at that time the Court had not yet accepted the transposability of the then Art. 215(2) EC case law to the liability of Member States, as it did later (*Brasserie du Pêcheur/Factortame III*, *op.cit.*, para. 42), although AG Mischo in *Francovich* had already so suggested (*Francovich*, *op.cit.*, AG’s Opinion, para. 71).

⁸⁰¹ Cited *supra*.

of 20 September 2001.⁸⁰² The issues involved were of such importance that competition and general Community law specialists in Europe were eagerly awaiting the Court's judgment.⁸⁰³ In *Courage* the Court recognised a right in damages as a matter of Community rather than of national law and stressed the fundamental character of the EC competition rules in the overall system of the Treaty.

The dilemma for the Court was to choose between the "traditionalist" and the more "integrationist" approach. It could either consider the whole question of damages in the context of national remedial and procedural autonomy, i.e. as a question of national law, subject to the Community law minimum requirements of equivalence and effectiveness, or proceed to the recognition of a Community right in damages, as AG Van Gerven had previously proposed in *Banks*.

It is noteworthy that the "traditionalist" approach had basically been represented by continental textbooks and articles, notably by German and French (competition law-specific) literature. It is not an exaggeration to say that the whole issue of the Community or national legal basis for a right in damages had been ignored by the majority of this part of the literature, or, at best, had been considered in the context of the national remedial-procedural autonomy and its Community law limits.⁸⁰⁴ On the other hand, English and Irish sources had

⁸⁰² We prefer to refer to this case by the name of the original plaintiff, thus following the established tradition in Community law literature. We use, however, the defendant's name, *Crehan*, to refer to the UK cases in that litigation.

⁸⁰³ See Roth, "The New UK Competition Act - The Private Perspective", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001), pp. 85-86; Gyselen, "Comment from the Point of View of EU Competition Law", in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001), p. 135 *et seq.*; Van Gerven, *supra* (2003a), p. 58 *et seq.*

⁸⁰⁴ See e.g. Koutsoukis, *supra* (1993), p. 335 *et seq.*; A. Toffoletto, *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust* (Milano, 1996), pp. 114-115 (speaking of the Commission's and of other Community institutions' reference to the necessity of an effective remedy of damages as a mere "wish"); Schmidt, in: Immenga & Mestmäcker (Eds.), *EG-Wettbewerbsrecht, Kommentar*, Vol. I (München, 1997), p. 58 *et seq.*; Poillot-Peruzzetto and Luby, *Le droit communautaire appliqué à l'entreprise* (Paris, 1998), p. 270; Tavassi and Scuffi, *supra* (1998), p. 301; Maitz-Strassnig, "Rapport autrichien", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999), pp. 31-32; Schapira, Le Tallec, Blaise and Idot, *supra* (1999), p. 299; M. Waelbroeck and A. Frignani, *European Competition Law (Vol. IV of the J. Mégret Commentary)* (Arsdley, 1999), p. 527 *et seq.*; Schröter, in: Von der Groeben, Thiesing & Ehlermann (Eds.), *Kommentar zum EU-EG-Vertrag*, Vol. 2/1, *Artikel 85-87 EGV* (Baden-Baden, 1999), p. 2/268 *et seq.* and p. 2/767; Ritter, Braun and Rawlinson, *supra* (2000), p. 926; Mestmäcker, *supra* (2000b), p. 421 *et seq.*; Mestmäcker, *supra* (2001), pp. 233, 236; Schröter, *supra* (2003), pp. 309, 327; Tavassi, *supra* (2004), p. 332. See, however, Mail-Fouilleul, *supra* (2002), pp. 580-582, who seems to accept the Community law basis; C. Nowak, *Konkurrentenschutz in der EG, Interdependenz des gemeinschaftsrechtlichen und mitgliedstaatlichen Rechtsschutzes von Konkurrenten* (Baden-Baden, 1997), p. 230 *et seq.*, referring to *Banks* and to the state liability case law of the ECJ and supporting the Community law basis of the right in damages; Weyer, "Gemeinschaftsrechtliches Verbot und nationale Zivilrechtsfolgen - Eine Untersuchung am Beispiel der Artikel 81, 82 EG-Vertrag", 7 ZEuP (1999) 424, pp. 437-439, addressing this issue but rejecting the Community basis. More perceptive to the Community

shown an extreme awareness and conviction as to the existence of a Community remedy of damages not only *de lege ferenda*, but also *de lege lata*.⁸⁰⁵ This difference of philosophy is not due to the continentals' lack of judgment but rather to more systemic differences between the common and the civil law worlds.

The facts of *Courage* were rather undistinguished. Breweries in Britain usually own pubs, which they lease to tenants, while the latter are under contractual obligations to buy almost all the beer they serve from their landlords. In 1991 Mr. Bernard Crehan signed a 20-year lease with Courage Ltd. whereby he had to buy exclusively from Courage a fixed minimum quantity of beer while the brewery undertook to supply the specified quantities at prices shown in the tenant's price list. The rent was initially lower than the market rate and it was subject to a regular upward review, but it never rose above the best open market rate. In 1993 Mr. Crehan and other tenants fell into financial arrears, basically blaming for this Courage's supply of beer in lower prices to other non-tied pubs, "free houses". In the same year Courage brought an action for the recovery from Mr. Crehan of sums for unpaid deliveries of beer. Mr. Crehan alleging the incompatibility with Article 81(1) EC of the clause requiring him to purchase a fixed minimum quantity of beer from Courage, counter-claimed for damages.⁸⁰⁶

basis of the right in damages appear to be some Austrian commentators (see Stillfried and Stockenhuber, "Schadenersatz bei Verstoß gegen das Kartellverbot des Art 85 EG-V", 9 WBI 301 + 345 (1995), p. 345 *et seq.*). See also Bastianon, "Il risarcimento del danno per violazione del diritto antitrust in Inghilterra e in Italia", 3 *Danno e Responsabilità* (1998) 1066, p. 1067, who, referring to the recent Community case law (though not to AG Van Gerven's Opinion in *Banks*), makes an interesting distinction between recovery of damages (*risarcimento*) and recoverability of damages (*risarcibilità*). According to this author the latter should rather be a principle of Community law, since its basis lies directly in the rights that EC law confers on individuals.

⁸⁰⁵ See e.g. Maitland-Walker, "Editorial: A Step Closer to a Definitive Ruling on a Right in Damages for Breach of the EC Competition Rules", 13 ECLR 3 (1992); Shaw, *supra* (1995), p. 138 *et seq.*; Winterstein, "A Community Right in Damages for Breach of EC Competition Rules?", 16 ECLR (1995) 49; Francis, "Subsidiarity and Antitrust: The Enforcement of European Competition Law in the National Courts of Member States", 27 *Law & Pol'y Int'l Bus.* 247 (1995), pp. 254, 273; Vaughan, *supra* (1995), p. 27; Weatherill, "Public Interest Litigation in EC Competition Law", in: Micklitz & Reich (Eds.), *Public Interest Litigation Before European Courts* (Baden-Baden, 1996), p. 185; Tickle and Tyler, "Community Competition Law, Recovering Damages in the English Courts: New Era? False Dawn", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997), p. 137 *et seq.*; Whish, "The Enforcement of EC Competition Law in the Domestic Courts of Member States", in: Gormley (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997), pp. 81-82; Anderson, "Damages for Breach of Competition Rules", in: Andenas & Jacobs (Eds.), *European Community Law in the English Courts* (Oxford, 1998), p. 185 *et seq.*; Rodger and MacCulloch, "Community Competition Law Enforcement, Deregulation and Re-regulation: The Commission, National Authorities and Private Enforcement", 4 *Columbia JEL* 579 (1998), pp. 599-600; Kerse, *supra* (1998), pp. 439-441; Taylor, *supra* (1999), p. 267; Lane, *supra* (2000), pp. 203-204; P.M. Roth (Ed.), *Bellamy & Child European Community Law of Competition* (London, 2001), pp. 801-809. See also Green, "The Treaty of Rome, National Courts, and English Common Law: The Enforcement of European Competition Law after *Milk Marketing Board*", 48 *RabelsZ* (1989) 509, whose views at that distant time, before *Francovich* and other cases on remedies had been decided by the ECJ, are very "modern" indeed.

⁸⁰⁶ There is some uncertainty as to the exact nature of Mr. Crehan's claim of damages. The question is whether this was a claim in tort (breach of statutory duty) or in restitution. This uncertainty might be accentuated by the fact that the recovery that Mr. Crehan sought is of limited extent. He basically asked the national court to put him in the condition he would have been, had he not entered into the agreement. He did

There were two specific obstacles to Mr. Crehan's success. The first one was that according to earlier case law, Article 81 EC had been interpreted as protecting only third parties, i.e. competitors or consumers, but not co-contractors, i.e. parties to the illegal and void agreement.⁸⁰⁷ Then, the second issue was that under English law a party to an illegal agreement, as this was considered to be so by the Court of Appeal, could not claim damages from the other party. This was as a result of the strict construction English courts were giving to the *nemo auditur turpitudinem propriam (suam) allegans* or *in pari delicto potior est conditio defendentis* or *ex dolo malo non oritur causa* rule,⁸⁰⁸ which in essence meant that Mr. Crehan's claim in damages would fail, because he was co-contractor in an illegal agreement. That seems to explain the link between these two central issues.⁸⁰⁹

The Court of Justice, following word-by-word in some instances the ruling in *Francovich*, that had recognised the principle of state liability as a principle of Community law, stressed the primacy of Article 81 EC in the system of the Treaty, since it "constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".⁸¹⁰ It also stressed, with particular reference to "the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition", the task of national courts to ensure the full effect (*plein effet*) of Community rules and the protection of individuals' rights conferred by those rules. The full effectiveness (*pleine efficacité*) of the Treaty competition rules and, in particular "the practical effect [*effet utile*] of the prohibition laid down in Article [81(1)]" would be put at risk, if individuals could not claim damages for losses caused by the infringement of those rules. The instrumental character of such liability for the effectiveness of the law as such is more than evident in this passage, exactly as it was the case with state liability in *Francovich*.⁸¹¹ And finally the Court dispelled any doubt as to its pronouncement:

not, therefore, claim damages for consequential losses or lost profits. In this respect, his claim, albeit in tort, was of a merely restitutionary nature. See on the issue Gyselen, *supra* (2001), p. 139. Van Gerven speaks of "restitutionary damages", which are in the borderland between damages (in tort) and unjustified enrichment (Van Gerven, *supra* (2003a), p. 60. It seems, however, that the action in this case was, or in any case was stated by the referring national court to be, one in tort (breach for statutory duty).

⁸⁰⁷ *Gibbs Mew plc v. Gemmell* (CA), [1998] EuLR 588. The Court of Appeal in this case had proceeded in the interpretation of Article 81 EC "without considering it necessary to seek a ruling from the Court of Justice on the point", as the ECJ explains in para. 12 of its *Courage* ruling, thus implying a certain criticism of this unilateralist approach.

⁸⁰⁸ See on all these rules with subtle distinctions, Virgo, "The Effect of Illegality on Claims for Restitution in English Law", in: Swadling (Ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* (London, 1997), p. 150 *et seq.*

⁸⁰⁹ See further Komninos, *supra* (2002), pp. 462-463. The *in pari delicto* defence applies to restitutionary, as well as to tortious claims and has invariably drawn staunch criticism.

⁸¹⁰ *Courage*, *op.cit.*, para. 20.

⁸¹¹ *Courage*, *op.cit.*, para. 26, very close to the text of para. 33 of *Francovich*.

“Indeed, *the existence* of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts *can make a significant contribution to the maintenance of effective competition in the Community*”.⁸¹²

This last quote makes clear that the meaning of effectiveness in *Courage* has a double facet.⁸¹³ It refers not only to Community law in general, but also to the specific field of antitrust. This is clear by the term “significant contribution” used by the Court to refer to the role of damages claims for the efficiency of antitrust enforcement in Europe, with a view to maintaining effective competition. More authoritative words in favour of private enforcement and of the “private attorney-general” role of the civil litigant could hardly be pronounced.

ee. *Courage* Seen between Community and National Law

The importance of *Courage* is that it sets the principle.⁸¹⁴ This has symbolic, but also practical consequences. The recognition of a right in damages by the Community judge eliminates a state of uncertainty and gives national courts an important signal.⁸¹⁵ The saga on whether damages can be awarded for violation of the Treaty competition rules has now ended once and for all. Indeed, to use the example of English law, it was a very unfortunate situation to wonder at the end of the 1990s on the existence of a right in damages as such,⁸¹⁶ and always to revisit the *Garden Cottage*⁸¹⁷ dicta.⁸¹⁸ Although it is true that certain European legal systems have availed themselves of clear legal bases for damages claims in case of antitrust-related harm,⁸¹⁹ we fail to see how this reality could be an obstacle to the

⁸¹² *Courage*, *op.cit.*, para. 27 (emphasis added), another text that can be read in parallel to para. 34 of *Francovich*.

⁸¹³ See above on these two facets.

⁸¹⁴ See e.g. S. Weatherill, *Cases and Materials on EU Law* (Oxford, 2003), p. 606, speaking of the Court’s “anxiety to promote the *effectiveness* of private enforcement”.

⁸¹⁵ See Goyder, *supra* (2003), p. 560.

⁸¹⁶ See e.g. M. Coleman and M. Grenfell, *The Competition Act 1998, Law and Practice* (Oxford, 1999), p. 288, who were still writing that “it is not absolutely certain that third parties *do* in fact have a right in damages in the English courts under Articles 81 and 82”. See also Beard, “Damages in Competition Law Litigation”, in: Ward & Smith (Eds.), *Competition Litigation in the UK* (London, 2005), pp. 257-258.

⁸¹⁷ *Garden Cottage Foods Ltd. v. Milk Marketing Board* (HL), [1983] 2 All.ER 770.

⁸¹⁸ This state of uncertainty has been described and castigated by Jones, *supra* (1999), p. 97.

⁸¹⁹ A German commentator, while the Court’s judgment was expected, had emphasised that the “invention” of a Community right in damages would offer nothing at all in the German context, since German law already provided for appropriate remedies (see Basedow, *supra* (2001), pp. 461-462). See also Mestunäcker, *supra* (2000b), p. 426, who, arguing against the thesis of Clifford Jones on the Community nature of the right in damages, considers that “new Community law remedies for a breach of competition rules are not self-explanatory nor self-executing and do not define themselves”. It is unclear, however, what this highly respected

development of Community law, which has its own exigencies and aspirations. It has been rightly pointed out that even if there is no clear gap in the effective judicial protection of Community competition law-based rights in those legal systems, still the recognition of a Community remedy in damages makes a valuable contribution towards the uniformity, consistency and maximum effectiveness-efficiency of the application of EC (competition) law at the national level.⁸²⁰

The enunciation of a Community right in damages and, by implication, of a principle of civil liability of individuals for breach of Community law, is a logical consequence of the Court's abundant case law on state liability, and reflects a more general principle of Community law that "everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty" (*neminem laedere*).⁸²¹ That principle is utterly connected with the very nature of the Community and actually reflects the "dogmatic-developmental history of the Community legal order" (*dogmatische Entwicklungsgeschichte der Gemeinschaftsrechtsordnung*).⁸²² The extension of this principle to liability of individuals makes it possible to speak of a system of civil liability for Community law infringements,⁸²³ irrespective of the perpetrator of the latter.⁸²⁴ This is exactly what Advocate General Van Gerven had argued for in *Banks* and what has also been proposed by other authors in the past.⁸²⁵

commentator means by this aphorism. He goes on to stress that the only way to provide for such remedies would be through approximation, in other words through a directive.

⁸²⁰ See Stillfried and Stockenhuber, *supra* (1995), p. 350. See also in this sense, Kerse, *supra* (1998), pp. 440-441.

⁸²¹ See Edward and Robinson, "Is there a Place for Private Law Principles in Community Law?", in: Heukels & McDonnell (Eds.), *The Action for Damages in Community Law* (The Hague/London/Boston, 1997), p. 341, referring to para. 12 of AG Tesaro's Opinion in *Brasserie du Pêcheur/Factortame III*, *op.cit.* In that passage the AG had reached the conclusion that "in so far as at least the principle of state liability is part of the tradition of all the legal systems, it must be able to be applied also where the unlawful conduct consists of an infringement of a Community provision" (*ibid*, para. 13 of AG's Opinion). The AG had started from the premise that the idea of state liability formed part of a more general principle of non-contractual liability (*neminem laedere*). See also Stathopoulos, "The Court of Justice of the European Communities and the Unification of Civil Law", 23 RHDE 511 (2003) [in Greek], p. 528.

⁸²² See Metaxas, *supra* (2005), pp. 23-24, with further references to German literature.

⁸²³ See also Drexel, "Do We Need 'Courage' for International Antitrust Law? Choosing between Supranational and International Law Principles of Enforcement", in: Drexel (Ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law* (Bern/The Hague/London/New York, 2003), p. 339.

⁸²⁴ This has not been missed by the Commission, which in para. 10, fn. 26, of its new co-operation Notice, lists together the remedy of damages in case of an infringement by an undertaking, referring to *Courage*, and the remedy of damages in case of an infringement by a Member State or by an authority which is an emanation of the State, referring to *Francovich*.

⁸²⁵ See in this sense Edward and Robinson, *supra* (1997), p. 340 *et seq.*; W. Van Gerven, J. Lever and P. Larouche, *Common Law of Europe Casebooks: Tort Law* (Oxford/Portland, 2000), p. 895. See also Saggio, "La responsabilità dello stato per violazione del diritto comunitario", 6 *Danno e Responsabilità* 223 (2001), p. 242, according to whom, the exigency of effective judicial protection which forms to an extent the basis of the Community nature of the principle of state liability for violation of EC law must also apply to civil liability of

Meanwhile, the Court's approach in *Courage* to recognise this Community law principle in a non-celebrative way and without defining, at least at that time, specific uniform conditions, created some confusion. While the majority of commentators grasped the fundamental importance of this ruling,⁸²⁶ others failed to see the basic principle and merely speak of national remedies, which are adapted by having recourse to the classical minimum effectiveness proviso.⁸²⁷ Such resistance to accept the Community law-basis of the civil liability principle should not, however, come as a surprise, since, in the past, there have even

individuals for Community law violations. See further Stathopoulos, *supra* (2003), p. 526, who stresses that there is nothing "exceptional" with state liability. Indeed, the principle that lies behind state liability is the same as the one lying behind individual liability. The author rejects the argument that state liability, contrary to individual liability, pertains to the public interest, since the public interest is also taken into account in the resolution of private disputes.

⁸²⁶ On the French side see, among the commentaries, Poillot-Peruzzetto, 12(1) *Contr. Conc. Consomm.* (2002) 28, p. 29, who senses the foundations of a Community law principle, which, however, is not yet constructed; Klages, 2 *RDUE* (2001) 1003, p. 1005, according to whom "if Member States are charged to regulate the procedural modalities, the right itself to claim damages exists already at the Community level" (emphasis added); Blaise and Idot, *supra* (2002), p. 144, speaking of a judgment of principle. On the Italian side see Bastianon, 7 *Danno e Responsabilità* (2001) 1153, p. 1155, speaking of a "leading case" that pushes aside in a summary way any doubt as to the Community law basis and conditions of the damages remedy in competition cases; Rossi, 125 *Il Foro Italiano* (2002), IV, 90, p. 91, who stresses the Court's tacit depart from earlier case law towards a communitarisation of the liability rules in EC competition cases; Palmieri and Pardolesi, 125 *Il Foro Italiano* (2002), IV, 76, p. 77, who see the case in the light of general judicial harmonization of European contract law. On the German side see Nowak, 12 *EuZW* (2001) 717, who, after stressing the judgment's similarities with *Franovich*, stresses the primary Community law basis of the right in damages, notwithstanding the fact that the Court did not explicitly speak of a Community principle (as in *Franovich*); C. Joerges, *Sur la légitimité d'européaniser le droit privé, Plaidoyer pour une approche procédurale*, EUI Working Paper, Law No. 2004/4, pp. 21-22, 36, speaking of the creation of a "new private law that the Member States must incorporate as their 'national law'". For an Austrian comment see Hintersteiner, "Gemeinschaftsrechtliche Schadenersatzpflicht bei Verstoß gegen Art. 81 EG", 16 *WBI* (2002) 554, p. 556, according to whom the result of *Courage* is that it is no longer in the discretion of national legal systems to provide or not a remedy in damages and that national courts are now bound under Community law to grant such damages.

⁸²⁷ See Weyer, 51 *GRUR Int.* (2002) 57, p. 58; Rodger, *supra* (2002), p. 234 *et seq.* and p. 242 in particular; Schröter, *supra* (2003), p. 327, who see the whole case from a procedural autonomy-Community limits angle. See also in this sense Albors-Llorens, *supra* (2002), p. 149, *idem*, "*Courage v. Crehan*: Judicial Activism or Consistent Approach?", 61 *CLJ* 38 (2002), p. 40; Tesouro, *supra* note (2004), p. 185, fn. 3; who consider that the Court did not follow AG Van Gerven's *Banks* Opinion and that it confirmed that the right to compensation in EC competition law cases remains a matter of national law. Surprisingly enough, the same approach is followed by the CFI in case T-395/94, *Atlantic Container Line AB et al. v. Commission*, [2002] ECR II-875, para. 414, where reference is made to para. 29 of *Courage*, i.e. to the *Rewe/Comet* formula on national procedural autonomy and on its two Community provisos, non-discrimination and effectiveness (see above): "... the case-law establishes that the consequences in civil law attaching to an infringement of Article [81] of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law ... [references to para. 29 of *Courage* and to para. 50 of *Automec II*] ... subject, however, to not undermining the effectiveness of the Treaty". This reference completely ignores the preceding paragraphs of *Courage* and constitutes in our view a misreading of that fundamental judgment. The language of *Courage* - we should not forget - should be seen in the Art. 234 EC context of "dialogue" between the Community court and the *juges communautaires de droit commun* and it, therefore, serves the exigencies of its context, which the CFI - a court of a different context - may have totally missed.

been voices doubting the Community law-basis of the principle of state liability, notwithstanding the Court's much clearer language in *Francovich*.⁸²⁸

Courage in this context is similar to restitution cases, where individuals claim recovery of charges for sums levied in violation of Community law by public authorities.⁸²⁹ Exactly as in *Courage*, in these cases the Court follows a more reserved approach. It has stressed that repayment or restitution of unlawfully levied charges is required and that this right has a Community law basis.⁸³⁰ But then, it delegates the issue and the conditions of the *exercise* of the right to restitution to national law, while stressing the Community law requirements of equivalence and effectiveness. In the last years, in fact, the Court has gradually laid down a growing number of uniform conditions, albeit in a negative way, i.e. by reading national provisions basically through the proviso of effectiveness of Community law.⁸³¹

Furthermore, both in *Francovich* and in *Brasserie du Pêcheur/Factortame III* the Court introduced some flexibility by stressing that the conditions under which liability arises "depend on the nature of the breach of Community law giving rise to the loss and damage".⁸³² In reality, *Courage* is a *Francovich* and not a *Brasserie du Pêcheur/Factortame III* type of case. We mean by this that it was only the first case, setting the principle. In other words, the Court left it open to proceed in an appropriate way to draw in more detail the

⁸²⁸ See e.g. Nettesheim, "Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht", 45 DÖV 999 (1992).

⁸²⁹ After the outcome in *Courage*, it would not be difficult to say that under Community law there is also in principle a right of individuals as against other individuals to restitution for sums paid in violation to Community law. This is so, because the requirement of effective judicial protection should not have a different function in such private disputes. On restitution and Community law, see A. Jones, *Restitution and European Community Law* (London, 2000).

⁸³⁰ Compare e.g. case C-147/01, *Weber's Wine World Handels-GmbH et al. v. Abgabenberufungskommission Wien*, [2003] ECR I-11365, para. 93: "Individuals are entitled to obtain repayment of charges levied in a Member State in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State in question is therefore required, in principle, to repay charges levied in breach of Community law" That the right of restitution is based directly on Community law is made clear by the following statement of the Court regarding the passing-on defence and the principle that unjust enrichment should be avoided: "As that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively" (*op.cit.*, para. 95, emphasis added). On the Community principle and the national conditions (plus the Community provisos) in such cases see Dougan, "Cutting your Losses in the Enforcement Deficit: A Community Right to the Recovery of Unlawfully Levied Charges?", 1 CYELS (1998) 233, p. 235 *et seq.*; J. Beatson and E. Schrage, *Casebooks on the Common Law of Europe, Unjustified Enrichment* (Oxford/Portland, 2003), pp. 10-11; Bouchayar, "Recovery of Illegally Levied Indirect Taxes that Have Been Passed on the Consumers under the New Case Law of the ECJ", 10 *Dikaio Epicheiriseon kai Etairion* 519 (2004) [in Greek], p. 521 *et seq.*

⁸³¹ According to Van Gerven, *supra* (2000), p. 517, although the remedy of restitution is in principle a matter of Community law, the Court has nevertheless left a lot of space to national law and courts, while imposing limits on the latter when Community requirements make it necessary. Interestingly enough, many recent judgments of the Court provide for increasingly detailed limitations to national procedural autonomy. See e.g. case C-62/00, *Marks & Spencer plc v. Commissioners of Customs & Excise*, [2002] ECR I-6325, para. 40 *et seq.*

⁸³² *Francovich*, *op.cit.*, para. 38; *Brasserie du Pêcheur/Factortame III*, *op.cit.*, para. 38.

conditions of the remedy,⁸³³ either in a positive way, by defining itself, to use former Advocate General Van Gerven's scheme,⁸³⁴ the pertinent "constitutive conditions", or in a negative one, by checking whether the "executive conditions" governed by national law are offending against the principles of equivalence and effectiveness-adequacy. This is certainly a sign of maturity of the Community-national law interrelationship. It is also a sign of a more "deliberative", rather than a hierarchical mode of interaction with national courts.⁸³⁵ As one author observes, "since the general principles of the law governing remedies have now been established, the Court can entrust national courts to apply those principles and be more selective with regard to the national rules with which it takes issue".⁸³⁶

ff. *Manfredi*

Indeed, as predicted by commentators,⁸³⁷ in the recent *Manfredi* ruling, the Court of Justice proceeded further to deal with the "constitutive" and "executive" conditions of the Community right in damages.⁸³⁸ This was a preliminary reference case from Italy, where insurance companies had been sued for damages by Italian consumers for prohibited cartel behaviour previously condemned by the Italian competition authority.⁸³⁹ The ECJ was basically called to decide:

- (a) whether consumers enjoy a right to sue cartel members and claim damages for the harm suffered, where there is a causal relationship between the agreement or concerted practice and the harm;

⁸³³ See Van Gerven, *supra* (2003b), p. 12; *idem*, *Bringing (Private) Laws Closer to Each Other at the European Level* (January 2005), in: http://www.law.kuleuven.ac.be/ccle/pdf/2005-01-18_WvG_Impact_courts_on_private_law.pdf, p. 20.

⁸³⁴ See above.

⁸³⁵ On this point of the relationship between the ECJ and national courts, especially in private law cases, see Joerges, "The Bright and the Dark Side of the Consumer's Access to Justice in the EU", 1(2) *Global Jurist Topics*, Article 1 (2001), p. 9.

⁸³⁶ See Tridimas, *supra* (2000), p. 466; *idem*, "Judicial Review and the Community Judicature: Towards a New European Constitutionalism?", in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001), p. 77, speaking of "selective deference" to national remedial and procedural autonomy.

⁸³⁷ Compare Komninos, *supra* (2002), p. 478.

⁸³⁸ Cited *supra*.

⁸³⁹ Italian courts had earlier sent similar preliminary references to Luxembourg, but these were held inadmissible by the ECJ because the Court thought that the referring courts did not include enough information as to the purpose and necessity of the references: case C-425/03, *Provvidenza Regio v. AXA Assicurazioni SpA*, Order of 19 October 2004, unpublished; joined cases C-438/03, C-439/03, C-509/03 and C-2/04, *Antonio Cannito et al. v. Fondiaria Assicurazioni SpA et al.*, Order of 11 February 2004, [2004] ECR I-1605.

- (b) whether the starting time of the limitation period for bringing an action for damages is the day on which the agreement or concerted practice was put in effect or the day on which the agreement or concerted practice came to an end;
- (c) whether a national court should also award of its own motion punitive damages to the injured third party in order to make the compensable amount higher than the advantage gained by the infringing party and deter the adoption of agreements or concerted practices prohibited under Art. 81 EC.⁸⁴⁰

The Court, building on *Courage*, and after making clear that the basis for individual civil liabilities deriving from a violation of Article 81 EC lies indeed in Community law, seems to have followed former Advocate General Van Gerven's scheme of "constitutive", "executive" and simple "procedural" conditions of the Community right in damages. Thus, the Court makes a fundamental distinction between "existence" and "exercise" of the right in damages. That the "existence" of the right is a matter of Community law is obvious from the fact that the Court reiterated the most important pronouncements of *Courage* in a solemn way.⁸⁴¹ In this context, it is also clear that the Court proceeds to define, as a matter of Community law, what former Advocate General Van Gerven calls "constitutive" conditions of the right in damages:

"It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."⁸⁴²

In other words, the right in damages is open (a) to "any individual" as long as there is (b) "harm", and (c) there is a "causal relationship" between that harm and the antitrust violation. In thus defining the Community law constitutive conditions of the right in damages, the Court has produced a broad rule of standing and has at the same time omitted the requirement of fault, which means that national rules following more restrictive rules on standing or

⁸⁴⁰ The Court was also called to decide whether the nullity of agreements contrary to Art. 81 EC can be relied upon by third parties (its answer was yes; see above) and whether Community law is contrary to a national rule which provides that plaintiffs must bring their actions for damages for infringement of Community and national competition rules before a court other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. Another preliminary question sent to Luxembourg in this case related to the applicability of Community law to the anti-competitive conduct.

⁸⁴¹ *Manfredi*, *op.cit.*, paras. 60, 61, 63, 89-91, citing paras. 25-27 of *Courage*. In particular, para. 91 of *Manfredi*, quoting para. 27 of *Courage*, stresses that "the *existence* of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community" (emphasis added).

⁸⁴² *Manfredi*, *op.cit.*, para. 61.

requiring intention or negligence for an action for damages to be successful, are contrary to the Community law constitutive conditions of the *Courage/Manfredi* right in damages.⁸⁴³

To mark the distinction between the existence of the right and its constitutive conditions, governed by Community law, and its exercise and executive conditions, governed by national law, the Court stresses again that “any individual ... can claim compensation for [harm causally related with an Article 81 EC violation]” but “in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the *exercise* of that right, including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed”.⁸⁴⁴ We submit that the Court refers here to the “executive” rules of the Community right in damages. In Van Gerven’s scheme, these are separate from purely procedural rules which are again a matter for national law. They are also subject to a higher standard of control under an “adequacy test”, rather than a mere “minimum effectiveness” or “non-impossibility” test, which may continue to apply for simple procedural rules.

Indeed, the Court in *Manfredi* makes a clear distinction in its analysis between specific questions pertaining to the causal relationship between harm and antitrust violation and the availability of punitive damages, both seen as “executive” conditions,⁸⁴⁵ and questions on limitation of actions and competent national tribunals, both seen as “detailed procedural rules”. In addition, the Court seems to share the former Advocate General’s conviction that the former affect the very core of the exercise of Community-based rights and should therefore be subject to a more stringent test concerning the Community principle of effectiveness, while the latter can be subject to a more relaxed “non-impossibility” test.⁸⁴⁶ It is thus no surprise that the Court uses in *Manfredi* the “non-impossibility” language only in the context of the mere procedural rules and not in the context of the “executive” conditions.⁸⁴⁷ This means questions such as causality, nature of harm and damages, and defences, which can be characterised as “executive” conditions, will be subject to a more demanding test of effectiveness/adequacy, while questions such as competence of courts,

⁸⁴³ On these issues, see below.

⁸⁴⁴ *Manfredi*, *op.cit.*, paras. 63-64, emphasis added.

⁸⁴⁵ *Manfredi*, *op.cit.*, paras. 64 and 92 *et seq.*, as to causal relationship and punitive damages, respectively.

⁸⁴⁶ Compare case C-255/04, *Commission v. France*, Judgment of 15 June 2006, not yet reported, para. 40, which makes also a clear distinction between conditions affecting the very exercise of a Community right and “detailed procedural rules governing actions at law”.

⁸⁴⁷ Compare paras. 64 and 92, which refer merely to effectiveness, with paras. 71 and 78, which refer to effectiveness, seen through the prism of “rendering practically impossible or excessively difficult the exercise of rights conferred by Community law”.

limitation periods and rules on proof, which are more “procedural” in nature, will be subject to a minimum effectiveness/non practical impossibility test.

gg. Excursus: The Importance of *Courage* for Community Law in General

The attained result is undoubtedly a contribution towards a more consistent system of Community law. While the intermediate solitude of the principle of state liability might have justified in the pre-*Courage* state of affairs a reference to “bits and pieces”,⁸⁴⁸ its extension by the *Courage/Manfredi* rulings to individual civil liability presents a more homogeneous picture of the Community law of remedies. In addition, the final solution assures a certain degree of homogeneity and consistency in other areas of EC law, apart from competition law,⁸⁴⁹ while ensuring individuals’ full access to court.⁸⁵⁰ The role of the Court of Justice in the formation through its case law of a “European private law” is, of course, outside the scope of the current study,⁸⁵¹ but it suffices to stress here that by no means does competition law claim exclusivity in a Community law remedy in damages.

Instead, the latter will also be a suitable remedy for all cases of harm caused by the violation of other horizontally directly effective EC provisions to persons deriving rights from those provisions. Provisions of horizontal direct effect are not numerous.⁸⁵² One could conceivably speak of a Community right in damages in cases of harm caused as a result of discrimination on grounds of nationality (Article 12 EC), or sex discrimination by employers (Article 141 EC).⁸⁵³

⁸⁴⁸ Such a situation of “bits and pieces” in the area of liability for violation of EC competition law had already existed before *Courage*. In *GT-Link* (*op.cit.*), the ECJ had held that in case of violation of Arts. 86 and 82 EC by a public undertaking, the Member State concerned must make reparation to individuals according to the *Brasserie du Pêcheur/Factortame III* conditions for any losses incurred as a result of the breach of the competition rules. A basic argument in favour of the recognition of Community individual liability has been that civil liability under Art. 82 EC must be the same irrespective of whether the perpetrator of the anti-competitive act is a state or non-state entity. See e.g. Jones and Sufrin, *supra* note, p. 1211.

⁸⁴⁹ On the exigencies of consistency, harmonisation and homogeneity in the area of remedies for the protection of Community rights, see Van Gerven, “Toward a Coherent Constitutional System within the European Union”, 2 EPL (1996) 81, pp. 96-98.

⁸⁵⁰ See also Arts. 6 and 13 ECHR; Art. 47 of the EU Charter of Fundamental Freedoms, Art. II-107 of the European Constitution Treaty. See further Van Gerven, *supra* (2003b), p. 3.

⁸⁵¹ See e.g. Basedow, “Grundlagen des europäischen Privatrechts”, 44 JuS 89 (2004), pp. 93-95.

⁸⁵² See Steindorff, *supra* (1996), p. 277 *et seq.*

⁸⁵³ See Lever, “Mutual Permeation of Community and National Tort Rules”, in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001), p. 107. See also in this direction Ryan, *supra* (2000), p. 154, according to whom “if an individual is protected against discrimination, then it might be thought that liability for an act of discrimination ought to lie with the discriminating employer”. Whether Art. 12 EC can impose duties on individuals is still debated. See the balanced approach followed by W. Frenz, *Handbuch Europarecht*, Vol. I, *Europäische Grundfreiheiten*

It remains unclear, however, whether the four freedoms can also bind, apart from the state, private individuals.⁸⁵⁴ According to the dominant view, these provisions, especially Articles 28 to 30 EC on the free movement of goods, cannot apply as such to outright private contractual relationships, unless one party is a private regulatory body.⁸⁵⁵ Nevertheless, the case law in this area is in a state of evolution and it might be that the Court will soon recognise the horizontal direct effect of the four freedoms provisions.⁸⁵⁶ In particular, Article 39 EC on the free movement of workers, along with certain provisions of Regulation 1612/1968,⁸⁵⁷ should logically be applicable to and bind individual employers.⁸⁵⁸ The same can be argued for freedom to provide services and Article 39 EC.⁸⁵⁹ The provisions on free movement of people are among the most fundamental principles of constitutional nature for the Community and the presumption is that in principle they also bind individuals. Indeed, in *Angonese* the Court of Justice recognised that the prohibition contained in Article 39 EC of discrimination on the basis of nationality is also applicable to individuals.⁸⁶⁰ The Court based this conclusion, *inter alia*, on the consideration that the non-discrimination principle is couched in general terms and is not specifically addressed to the Member States. As Advocate General Geelhoed puts it in *Muñoz*, “the fact that some Treaty provisions are formally addressed to the Member States [does not] preclude rights from being conferred on individuals who have an interest in seeking to ensure compliance with the obligations thus laid down”.⁸⁶¹

(Berlin/Heidelberg/New York, 2004), pp. 1108-1109. On Art. 141 EC, see case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (II)*, [1976] ECR 455, para. 39.

⁸⁵⁴ See Van Gerven, Lever and Larouche, *supra* (2000), p. 952, fn. 232, who include Arts. 28, 39, 43, and 49 EC in the Treaty provisions of *horizontal* direct effect that can give rise to a Community right in damages in case of their violation.

⁸⁵⁵ Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman, Royal Club Liégeois SA v. Jean-Marc Bosman et al.*, and *Union des Associations Européennes de Football (UEFA) v. Jean-Marc Bosman*, [1995] ECR I-4921, para. 82. See further Snell, “And then there Were Two: Products and Citizens in Community Law”, in: Tridimas & Nebbia (Eds.), *European Union Law in the Twenty-First Century, Rethinking the New Legal Order*, Vol. II, *Internal Market and Free Movement Community Policies* (Oxford/Portland, 2004), pp. 56-60. For a rare and perhaps exceptional case where the Treaty provisions of free movement of goods were considered horizontally directly effective see case 58/80, *Dansk Supermarked A/S v. A/S Imerco*, [1981] ECR 181.

⁸⁵⁶ See Cherednychenko, “EU Fundamental Rights, EC Fundamental Freedoms and Private Law”, 14 ERPL 23 (2006), pp. 37-39.

⁸⁵⁷ Council Regulation 1612/68 of 15 October 1968 on Freedom of Movement for Workers within the Community, JO [1968] L 257/2.

⁸⁵⁸ See e.g. Ryan, *supra* (2000), p. 148.

⁸⁵⁹ See L. Woods, *Free Movement of Goods and Services within the European Community* (Aldershot/Burlington, 2004), pp. 185-187.

⁸⁶⁰ Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139. That case was one of possible discrimination stemming from a condition laid down by an individual employer on the recruitment of staff.

⁸⁶¹ Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd.*, [2002] ECR I-7289, para. 43 of AG’s Opinion.

Any other provision of primary or secondary Community law enjoying horizontal direct effect, if violated, could give rise to Community individual liability, in case of resulting damage.⁸⁶² Regulations, in particular, would generally qualify as basis for Community tort liability claims. Indeed, soon after *Courage*, the Court in *Muñoz* held that generally and directly applicable Community regulations, “owing to their very nature and their place in the system of sources of Community law, ... operate to confer rights on individuals which the national courts have a duty to protect”.⁸⁶³ In fact, the Court’s reasoning in *Muñoz* echoes that in *Courage*.⁸⁶⁴ The Court stresses that the availability of tort claims strengthens the effectiveness of the rules on quality standards and, in particular, the practical effect (*effet utile*) of the obligations laid down therein. It must, therefore, be possible to enforce such obligations by means of civil proceedings instituted by traders against their competitors. The Court was very clear as to the instrumental nature of such claims:

“As a supplement to the action of the authorities designated by the Member States to make the checks required by those rules [they help] to discourage practices, often difficult to detect, which distort competition. In that context actions brought before the national courts by competing operators are particularly suited to contributing substantially to ensuring fair trading and transparency of markets in the Community”.⁸⁶⁵

Whether directives can also be relied upon in such Community law based tort actions is rather doubtful. It has been suggested that since in *Francovich* the absence of direct effect of the norm in question did not exclude state liability, the same should be accepted for individual liability. Therefore, the argument goes, the violation of an unimplemented directive by an individual can render the latter liable in tort against another individual.⁸⁶⁶ It seems, however, that to accept the above would mean crossing too many artificial bridges.

While state liability may also exist, even if the substantive Community rules in question, for example some provisions of a non-implemented directive, do not have (vertical) direct effect,

⁸⁶² See, thus, with reference to secondary Community legislation on consumer protection, Hesselink, “The European Commission’s Action Plan: Towards a More Coherent European Contract Law?”, 12 ERPL 397 (2004), pp. 408-409, who, however, doubts whether the system of private remedies that the Court and the Commission will develop in the area of competition, will be inspired by the *acquis communautaire* of the Community legal instruments pertaining to contract law (e.g. consumer protection Directives).

⁸⁶³ *Muñoz*, *op.cit.*, para. 27.

⁸⁶⁴ See in this direction Van Gerven, “Harmonization of Private Law: Do we Need it?”, 41 CMLRev. 505 (2004), p. 522; *idem*, *supra* (2005a), p. 22.

⁸⁶⁵ *Muñoz*, *op.cit.*, paras. 30-31. See further Betlem, “Environmental Liability and Private Enforcement – Lessons from International Law, the European Court of Justice, and European Mining Laws”, 4 YEEL 117 (2004), p. 130 *et seq.*

⁸⁶⁶ See Betlem, *supra* (2004), p. 135 *et seq.*

the case is different in civil liability of individuals. *Horizontal* direct effect is a precondition of the Community principle of civil liability of individuals. Any other conclusion would be logically impossible. This is so, because the basis of such liability is the breach of the *applicable* Community rules. A relevant claim for damages in a civil trial between two natural or legal persons presupposes the *direct application* by the national courts of the substantive provision in question. In other words, it is not logically possible to separate the enforceability of the Community rules from the question of liability for their breach.⁸⁶⁷ Thus, for example, when damages are awarded in order to remedy a harm caused through the breach of Article 82 EC, this presupposes that the national court must already have concluded that this provision *applies* as to the private parties in question, as a result of its having *horizontal* direct effect. Direct effect might not be conceptually the basis for the establishment of a general Community principle of civil liability for breach of EC competition rules, since the basis of this principle in the Court's words is the full effectiveness of Community law.⁸⁶⁸ Direct Effect is, however, a logical precondition, a necessary first step, before the question of damages arises.

Finally, the fact that in certain cases directives may indirectly bind or impose burdens or obligations upon individuals under the principles of consistent interpretation⁸⁶⁹ and indirect effect⁸⁷⁰ does not suffice to lead to private enforcement of directives against individuals, since the provision of the directive in question is not in reality *directly applied* as between individuals. It is therefore not possible to speak of a Community right in damages in those cases.

hh. Post-*Courage* Developments: The Commission Green Paper on Damages

As already mentioned, the Court of Justice's *Courage* ruling provided for the impetus for the Commission to adopt a more pro-active stance in the whole question of private enforcement. The opportunity was indeed unique. Modernisation was now a reality and there were maybe for the first time serious debates in Europe as to the desirability to introduce further measures

⁸⁶⁷ See in this direction Shaw, *supra* (1995), p. 145; Komninos, *supra* note (2002), p. 471.

⁸⁶⁸ The full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC was considered by the Court to be the basis of the Community law principle of liability in *Courage* (*op.cit.*, para. 26), in the same way as the same full effectiveness of the Community rules formed the basis of state liability in *Francovich* (*op.cit.*, paras. 33-35).

⁸⁶⁹ See case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1990] ECR I-4135.

⁸⁷⁰ See case C-194/94, *CLA Security International SA v. Signalson SA and Securitel SPRL*, [1996] ECR I-2201.

to enhance private antitrust enforcement. Soon after the Court of Justice delivered its *Courage* ruling, the Commission commissioned a study on the conditions of claims for damages in the Member States in case of infringement of EC competition rules.⁸⁷¹ The results of that study, known as the “Ashurst Study” were published on the Commission’s website in 2004.⁸⁷² Predictably, the study showed an “astonishing diversity and total underdevelopment” of civil antitrust actions in the Member States. Up to mid-2004, there were apparently around 601 judged cases for damages actions (12 on the basis of EC law, around 32 on the basis of national law and 6 on both). Of these judgments, only 28 had resulted in a damages award having been made (8 on the basis of EC competition law, 16 on national law and 4 on both).⁸⁷³

After digesting the results of the Ashurst Study and reflecting further on the appropriate way to move forward, the Commission published on 19 December 2005 for public consultation a Green Paper and a Commission Staff Working Paper on damages actions for breach of the EC antitrust rules.⁸⁷⁴ The purpose of the Green Paper, which sets out a number of possible options to facilitate private damages actions, is to stimulate debate and facilitate feedback from stakeholders. The public consultation ran until 21 April 2006 and all received comments have now been posted on the Green Paper’s webpage.⁸⁷⁵

The Commission is in favour of increased private enforcement as it believes that this will have a number of advantages for private parties. In particular:

- (a) victims of illegal anticompetitive behaviour are compensated for loss suffered;
- (b) deterrence against antitrust infringements and compliance with the law is increased;
- (c) a competition culture amongst market participants, including consumers, will further develop, and awareness of the competition rules will be raised;

⁸⁷¹ Open Procedure COMP/2003/A1/22, available in: http://europa.eu.int/comm/dgs/competition/proposals2/study_tender_specifications.pdf.

⁸⁷² The study is made up of a comparative report (Waelbroeck, Slater and Even-Shoshan, “Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report”, 31 August 2004), a report on economic models for the calculation of damages and 25 national reports. See http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

⁸⁷³ See Waelbroeck, Slater and Even-Shoshan, *supra* (2004), p. 1. These statistics are only indicative, since in some Member States not all judgments are published and the comparative report necessarily relies on the national reports, whose quality varies. One must also bear in mind that these statistics do not include cases that have been settled with significant damages awarded to plaintiffs.

⁸⁷⁴ Both cited *supra*.

⁸⁷⁵ See http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html.

- (d) the Commission and the national competition authorities do not have sufficient resources to deal with all cases of anticompetitive behaviour, and in any event an administration has discretion to pursue other priorities.⁸⁷⁶

The Green Paper lists a variety of options in rather detailed form on ways to enhance private actions and to establish a more litigation-based system of private antitrust enforcement in Europe. The Commission has not given any official indication as to the follow-up to the Green Paper and insists that it has not yet decided on how to proceed. There are three possible alternative options for the Commission:

- (a) to propose or take no action at all and defer to the laws of the Member States, while hoping that the Green Paper will have an impact on the latter;
- (b) to proceed to the adoption of a “soft law” instrument at the Community level, such as a notice, a communication or guidelines, that will not be legally binding;
- (c) to propose Community legislation (“hard law”), in the form of a regulation or a directive (or both).

It seems that the Commission will probably propose a hard law legislative measure at Community level, most probably a Community directive, perhaps coupled with a more general regulation. Indeed, former Advocate General Van Gerven, who offered advice to the DG-COMP staff that worked on the Green Paper, has proposed that a regulation should be used to “set out the basic substantive conditions of the remedy in compensation” and a directive should accompany the regulation by laying down “the procedural aspects of the remedy”.⁸⁷⁷

The Commission has not indicated on what legal basis it might use to implement its proposal. This could be based on either Article 83(2) EC, which concerns measures to give effect to the competition law provisions of the EC Treaty, or Article 65(c) EC, which concerns measures in the field of judicial cooperation in civil matters having cross-border implications. These are the two legal bases that best coincide with “the aim and the content of the measure” that is contemplated, as the European Court of Justice requires for the adoption of Community legislative measures.⁸⁷⁸ Certain commentators contend that Article 83(2) EC would be the

⁸⁷⁶ See Commission MEMO/05/489, *op.cit.*, under the title “What in the Commission’s view are the advantages of private actions for damages?”.

⁸⁷⁷ See Van Gerven, *supra* (2005b), p. 5.

⁸⁷⁸ Case C 300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867, para. 21; case C-269/97, *Commission v. Council*, [2000] ECR I-2257, para. 43; case C-211/01, *Commission v. Council*, [2003] ECR I-8913, para. 38. The Commission cannot base its proposal on a combination of the two because each legal basis provides for a different legislative procedure (co-decision under Article 65(c) EC, consultation under Article 83(2) EC). See *Titanium dioxide*, *op.cit.*, paras. 17 to 21.

most appropriate legal basis for Community secondary legislation in these matters.⁸⁷⁹ This Article provides for the adoption by the Council of the appropriate measures to ensure the enforcement of EC competition law. However, whether an Article 83 EC-based measure could impose changes on national remedies and procedures is open to question. Of course, the text of Article 83(2) EC is quite open-ended in so far as it merely gives five examples of areas where the adoption of regulations or directives may be necessary to give effect to the principles set out in Articles 81 and 82 EC and does not set out an exhaustive list. As a result, while the Commission could to an extent rely on the wording of Article 83(2)(e) EC which provides for the adoption of such regulations and directives “to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article” the open-ended nature of Article 83(2) EC means that it is under no obligation to base its proposed measure on this specific subsection.⁸⁸⁰

Alternatively, the Commission could use, as legal basis, Article 65(c) EC which provides for measures “eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”. This provision, the product of the Amsterdam Treaty of 1999, is sufficiently general to be an appropriate legal basis, but the Commission will doubtless choose its preferred legal basis mainly on strategic considerations that ensure the final successful adoption of a Community measure. It is more likely that the Commission will opt for Article 83 EC because this provision requires only support from a qualified majority in the Council and the European Parliament is not brought into the legislative process with powers of co-decision but must only be consulted. The use of this provision will also mean that the legislative measure will be adopted by the Council in a configuration that is more accustomed with and friendlier to competition policy.⁸⁸¹

However, apart from these strategic considerations that the Commission may have in its mind, the choice of Article 83 EC and the presentation to the legal community of a more competition law-specific regulation or directive makes better sense from a systematic point of view. Any envisaged measure in the area of competition law is bound to create a sectoral regime at the national level, which in most cases is going to be quite separate from and lie outside the main body of national substantive and procedural civil law. While some commentators have criticised this rather inelegant state of disintegration and “bits and pieces”

⁸⁷⁹ See Van Gerven, *supra* (2003a), pp. 53-93 at 81-82; *idem*, *supra* (2005b), p. 5.

⁸⁸⁰ Besides, Art. 83(2)(e) refers to the relationship between national *competition* laws and Arts 81 and 82 EC.

⁸⁸¹ Ministers of National Economy and Finance (ECOFIN) or Competitiveness.

at the national law level, especially with reference to continental legal systems that are invariably based on systematic pieces of legislation like codes,⁸⁸² this unfortunate result is the necessary evil of the supranational structure of the EU and of the whole relationship between Community and national law. To the extent that Community law necessitates such inroads into national legal systems, it becomes more legitimate, in our view, to use exactly those specific legal bases that refer to the specific area of Community law in question, rather than using more generic legal bases that are more vulnerable from a legitimacy point of view.

In the particular area at stake, the introduction of a highly specific system of private antitrust enforcement will have profound consequences for national substantive and procedural laws. Especially with regard to substance, the Green Paper and the system it aspires to must be seen in the broader context of civil law harmonisation or unification in Europe, which has always existed as an over-ambitious aim but obviously cannot in the short or mid term lead to any concrete results.⁸⁸³ To defer, however, to those developments would not have been prudent on the part of the Commission, as far as private antitrust enforcement is concerned.

At the same time, the Green Paper must be seen as a follow-up to the Court of Justice's recent case law on individual civil liability for antitrust violations. In *Courage* and *Manfredi* the Court clearly set the principle as to the existence of a right in damages and its basic "constitutive" conditions but deferred to secondary Community legislation, in order to address the more detailed problems in an express and systematic way.⁸⁸⁴ This is obvious from the Court's language in *Manfredi* in dealing with the "executive" and "procedural" questions for the "exercise" of the right in damages. These were to be subject to national law, but only "in the absence of Community rules governing the matter".⁸⁸⁵ Of course, any secondary Community legislation that would provide expressly for the right in damages in cases of harm caused by EC competition law violations, would not add much, as far as the existence of the right itself is concerned, since according to *Courage* and *Manfredi* this right has a Treaty law basis, deriving from the principle of effectiveness of Community competition law.⁸⁸⁶ The

⁸⁸² See generally Joerges, "Economic Law, the Nation-State and the Maastricht Treaty", in: Dehousse (Ed.), *Europe after Maastricht: An Ever Closer Union?* (München, 1994), p. 29 *et seq.*

⁸⁸³ See above.

⁸⁸⁴ See Van Gerven, *supra* (2003a), pp. 90-93, producing a draft of a possible regulation on the substantive law aspects of private enforcement before national courts; *idem*, *supra* (2003b), p. 12. See, in addition, already Forrester and Norall, *supra* (1984), pp. 44-45, who alternatively proposed the publication by the Commission of a notice on this matter. The option of a notice on damages is supported by Siragusa, "Panel Two Discussion: Procedural Issues", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), pp. 178-179.

⁸⁸⁵ *Manfredi*, *op.cit.*, para. 64.

⁸⁸⁶ At this point a parallelism can be made with Directive 89/665/EEC on public procurement, *op.cit.* Art. 2(1)(c) of this Directive refers to the setting-up of national procedures that should lead to the award of "damages

main aim of such Community legislation would be to deal with the more specific issues of substance and procedure.

Indeed, the Commission's Green Paper on damages of December 2005, which may be a prelude to Community secondary legislation on this matter, clearly must be seen in the context described above. The Commission leaves no doubt that "the right to claim damages suffered from an infringement of Treaty competition law is ... derived from the EC Treaty directly".⁸⁸⁷ What the Green Paper on damages aims at, is to build upon this principle of Community law and "to render *the exercise* of that [Community law] right more effective",⁸⁸⁸ by concentrating upon "the *detailed rules* for bringing damages actions" and by identifying and remedying, possibly through secondary Community legislation, the main obstacles to a more efficient system of damages actions.⁸⁸⁹

ii. Post-*Courage* Developments: National Level

Modernisation and decentralisation of Community competition law enforcement and the related European debate on private enforcement, as well as the 2001 *Courage* ruling by the Court of Justice, led to important developments at the national level. The UK and Germany fully amended their legislation and, among other reforms, introduced provisions aimed at enhancing private antitrust enforcement of national and Community competition law. Other recently amended or adopted national competition laws contained for the first time provisions on the availability of damages for violations of competition law.⁸⁹⁰ At the same time, there

to persons harmed by an infringement". However, it is rightly stressed that this provision of this rather advanced legislative instrument (in the sense of "intrusion" into national procedural autonomy) "does in fact not add much to the principles expressed by the Court of Justice in *Francovich*, *Brasserie du Pêcheur*, and others which laid down the principle that individuals are entitled to claim damages before their national courts for violation of Community law", since this requirement derives "from the very essence of Community law and from its *effet utile*" (see H.G. Schermers and D.F. Waelbroeck, *Judicial Protection in the European Union* (The Hague/London/New York, 2001), p. 214). The same holds true for an eventual secondary Community instrument dealing with EC antitrust private enforcement, as far as the *Courage* principle of civil liability itself is concerned.

⁸⁸⁷ Commission MEMO/05/489, *op.cit.*, under the title "What has the European Court of Justice said in its case-law on the right in damages for breach of EC Treaty competition law?". Compare, however, Moch, "Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven", 56 WuW 39 (2006), p. 40, who reports from a conference in Germany, organised by the *Bundeskartellamt*, that Director General Lowe thought that the *Courage* jurisprudence did not entail a requirement of uniform conditions of tort liability throughout the Community. This statement, if reported correctly, must refer to the detailed conditions of that liability and not to the principle itself, which emanates from Community law.

⁸⁸⁸ See Commission MEMO/05/489, *op.cit.*, under the title "What has the European Court of Justice said in its case-law on the right in damages for breach of EC Treaty competition law?" *in fine*, emphasis added.

⁸⁸⁹ See Green Paper, under sections 1.2 and 1.3, emphasis added. On the specific proposals of the Green Paper see below the pertinent parts.

⁸⁹⁰ See above.

has been a recent surge of damages actions and awards in the national courts, most of them being cases of follow-on claims, i.e. actions relying usually on prior decisions by competition authorities. Whether this last development indicates an increased awareness of plaintiffs or changing judicial attitudes is still unclear but it certainly confirms that the European “awakening calls” are reaching the Member States.

Starting with the UK, the Competition Act 1998 did not contain any direct reference to civil actions or actions for damages, though the availability of such actions was implicit in some other provisions of the Act.⁸⁹¹ The absence of an express right was explained, because such a right was thought to exist under EC competition law and to provide for it expressly in the Act might prevent private litigants from benefiting from possible future Community law developments in this respect.⁸⁹² If that is indeed the explanation, then the choice of the legislator can be judged as *a posteriori* wise. Indeed, the EC interpretation clause of s. 60 of the Competition Act, which aims at ensuring that UK authorities and courts apply the domestic law provisions in a manner consistent with the application of EC competition law, makes specific reference also to Community decisions “as to the civil liability of an undertaking for harm caused by its infringement of Community law”.⁸⁹³

The situation was about to change. In 2001 a consultation paper by the Department of Trade and Industry powerfully advocated the desirability of private damages actions as a “very important limb of an effective competition regime”.⁸⁹⁴ Such actions were seen as serving two basic aims: first, compensation of victims of anticompetitive practices, and second, drawing private resources into the enforcement process, thus allowing public authorities to pursue the most important cases. The proposals did not stop here, but included collective suits by representative bodies, to be pursued before the CAT, acting on behalf of named and identifiable consumers (representative claims). These ideas were put in motion with the Enterprise Act 2002, which has transformed the UK system from a purely administrative

⁸⁹¹ E.g. ss. 55(3)(b) and 58(2) of the Competition Act 1998.

⁸⁹² See Coleman and Grenfell, *supra* (1999), pp. 286-287; P. Freeman and R. Whish, *A Guide to the Competition Act 1998* (London/Edinburgh/ Dublin, 1999), paras. 4.72-4.73; MacCulloch, “Private Enforcement of the Competition Act Prohibitions”, in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000), p. 100 *et seq.*; Middleton, *supra* (2000), pp. 26-27.

⁸⁹³ S. 60(6)(b) of the UK Competition Act. Pre-*Courage*, some commentators had spoken of a “renvoi” that this provision led to, assuming that Community law referred the whole question of the availability of civil damages back to national law (see e.g. J. Flynn and J. Stratford, *Competition: Understanding the 1998 Act* (Bembridge, 1999), pp. 16-19; Turner, “The UK Competition Act 1998 and Private Rights”, 21 EIPR (1999) 181, pp. 183-184, 186). This is of course no longer an accurate statement.

⁸⁹⁴ See HM Treasury, Department of Trade and Industry, *Productivity in the UK: Enterprise and the Productivity Challenge*, June, 2001; Department of Trade and Industry, *Productivity and Enterprise, A World Class Competition Regime*, July 2001.

enforcement system to a hybrid one with the private and criminal enforcement limbs far more developed than anywhere else in Europe.⁸⁹⁵

Of particular interest to private enforcement is the conferral of jurisdiction on the CAT to hear claims for damages in competition cases.⁸⁹⁶ This procedure is thought to make better use of existing judicial resources, thus reducing the costs for the parties.⁸⁹⁷ Damages claims before the CAT presuppose the establishment by either the OFT or the European Commission that an infringement of competition law has occurred.⁸⁹⁸ Such a finding of infringement is binding and cannot be re-litigated. These actions must be filed with the CAT within a period of two years beginning at the time of the public enforcer's final infringement decision or on the date on which the cause of action accrued.⁸⁹⁹ In addition, UK law provides for the possibility for ordinary civil courts to transfer to CAT competition issues arising in private civil actions.⁹⁰⁰

Then, section 58A of the UK Competition Act aims at facilitating follow-on civil actions for damages brought before the ordinary civil courts. It provides that findings of infringement of UK or Community competition law by the OFT (or by the CAT on appeal) bind the courts deciding on follow-on civil claims for damages.⁹⁰¹ By follow-on claims, the Act is meant to

⁸⁹⁵ See Middleton, "The Americanisation of UK Competition Law", 8 *Scottish Law and Practice Quarterly* 27 (2003), p. 29. That author expresses concerns with regard to the UK system's divergence from the Community model. However, the Enterprise Act does not affect substantive competition law and the new developments refer rather to institutional and procedural issues. At any rate, the introduction of private and criminal enforcement contribute to a more effective enforcement not only of national but also of *Community* competition law in the UK.

⁸⁹⁶ S. 47A of the Competition Act.

⁸⁹⁷ There are some disadvantages in this solution. Thus, the CAT will be burdened in many cases with the quantification of damages, a task that, according to some commentators, would be more appropriate for ordinary civil courts rather than for a specialised competition tribunal. In addition, parties may rely on competition law by means of a counter-claim in an otherwise non-competition case or conversely there may be a competition law claim but at the same time non-competition counterclaims. In such cases there are problems of conflicts of jurisdiction. See further on these problems Lever, "Restructuring Courts and Tribunals Hearing UK and EC Competition Law Cases", 1 *Comp.LJ* 47 (2002), p. 54; *idem*, "The Competition Appeal Tribunal and the Ordinary Courts", in: Hutchings & Andenas (Eds.), *Competition Law Yearbook 2002* (London, 2003), p. 32.

⁸⁹⁸ See Lever, *supra* (2002b), p. 51, who approves of this "inelegant" yet necessary solution. The right to bring such a claim is without prejudice to the existing right to bring damages claims in the ordinary civil courts (i.e. in the Chancery Division of the High Court). It should also be mentioned that the CAT may at any stage of the proceedings on the request of a party or of its own initiative direct that a claim for damages be transferred to the Chancery Division of the High Court in England or the Court of Session in Scotland. See para. 48 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372; Rule 8.7 of *Practice Direction – Transfer*, supplementing CPR Part 30.

⁸⁹⁹ S. 47A(7)(8) of the Competition Act; para. 31 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372. See also Rayment, "Practice and Procedure before the Competition Appeal Tribunal", in: Ward & Smith (Eds.), *Competition Litigation in the UK* (London, 2005), p. 129 *et seq.*

⁹⁰⁰ Para. 49 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372; Rule 8.3 of *Practice Direction – Transfer*, supplementing CPR Part 30. See further Lever, *supra* (2003b), p. 33, approving of this solution.

⁹⁰¹ Note that this provision is different from s. 47A of the Act. The former refers only to the UK competition authorities's decisions while the latter extends the binding effect of infringement findings also to decisions of the European Commission. In addition, the provision of s. 58A refers to follow-on civil proceedings

cover "proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement of competition law".⁹⁰² Apart from section 47A on follow-on civil claims for damages, the new UK system provides for another novelty: Section 47B provides for claims for damages brought on behalf of consumers by representative "specified" bodies.⁹⁰³ These are not meant as US-style class actions and the claim must specify the consumers on behalf of whom the claim is brought.⁹⁰⁴

The recent amendment of the German Competition Act makes another paradigm worth examining. German law has long-provided for antitrust damages actions⁹⁰⁵ but the new section 33 GWB marks an important progress in that it provides for a legal basis for damages claims for violation not only of German but also of Community competition law. The new provision also abandons the previous rather restrictive condition of standing, which was

for damages before the ordinary civil courts (the Chancery Division of the High Court), while s. 47A refers to follow-on claims brought before or transferred to the CAT.

⁹⁰² See *Explanatory Notes to the Enterprise Act 2002*, available at <http://www.legislation.hmso.gov.uk/acts/en2002/2002en40.htm>, para. 87: "Section 20: Findings of infringements. Subsection (1) inserts a new section 58A in CA 1998. The new section provides that certain decisions of the OFT or the CAT regarding an infringement of competition law are to bind the courts for the purpose of a subsequent claim for damages". On the history of this provision see Roth, "Panel Discussion: UK Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001), p. 122; Rodger, *supra* (2003), pp. 108-109.

⁹⁰³ According to s. 47B(9) of the Act, "specified" means specified in an order by the Secretary of State. See further *Specified Body (Consumer Claims) Order 2005*, SI 2005/2365.

⁹⁰⁴ Para. 33 of the *Competition Appeal Tribunal Rules 2003*, SI 2003/1372.

⁹⁰⁵ On the situation in Germany before the latest GWB amendment, see Baur, "Schadensersatz und Unterlassungsansprüche bei Verstößen gegen die Kartellrechtsvorschriften des EWG-Vertrags", 23 EuR (1988) 257, p. 260 *et seq.*; Braun, *supra* (1996), pp. 431, 580-581; Schmidt, *supra* (1997), p. 57 *et seq.*; Dieckmann, in: Wiedemann (Ed.), *Handbuch des Kartellrechts* (München, 1999), pp. 1271-1272. Apart from few exceptions where national competition laws themselves contain express provisions on the availability of damages (see above), national laws usually have referred to general provisions in their civil law for a legal basis for damages actions. For Austria, see s. 1311(2) ABGB; further Stillfried and Stockenhuber, *supra* (1995), p. 303 *et seq.*; Maitz-Strassnig, *supra* (1999), p. 35; Günther, *supra* (2001), p. 319. For Belgium, see Art. 1382 of the Civil Code; further Noirfalisse, *supra* (1994), p. 63; Van Bael, *supra* (2003), p. 57. For Finland, see the relevant provisions of the Compensation Act of 1974 (*Vahingonkorvauslaki*); further Erämetsä, *supra* (2001), p. 222. For France, see Arts. 1382 and 1383 CC; further Boulanger, *supra* (1997), pp. 194-195 and 293-294; Fasquelle, "La réparation des dommages causés par les pratiques anti-concurrentielles", 51 RTDComm. (1998) 763, p. 769 *et seq.*; Schapira, Le Tallec, Blaise and Idot, *supra* (1999), p. 299. For Greece, see Art. 914 of the Civil Code; further Iliopoulos, *supra* (2000), pp. 251, 289-290 and 303-304; Koutsoukis, *supra* (1993), p. 336 *et seq.*; Liakopoulos, *supra* (2000), pp. 498. For Ireland, see Maher, *supra* (1994), pp. 270-271; *idem*, *supra* (1999), pp. 63-68, 143, 165, 293-296. For Italy, see Art. 2043 of the Civil Code; further Ligustro, *supra* (1992), p. 218; Tavassi and Scuffi, *supra* (1998), pp. 301, 317 *et seq.*; Libertini, *supra* (2002), p. 452; Bastianon, *supra* (1998), p. 1073 *et seq.*; A. Pera, *Concorrenza e Antitrust* (Bologna, 2001), p. 58. For the Netherlands, see Art. 6:162 of the Dutch Civil Code; further Sevinga, "The Netherlands", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. II, *Benelux and Ireland* (Baden-Baden, 1994), p. 150; R.T. Ottervanger, J. Steenbergen and S.J. Van der Voorde, *Competition Law of the European Union, the Netherlands and Belgium* (The Hague/London/Boston, 1998), p. 105; Van Reeken and Noë, *supra* (2000), p. 457; Bos and Struijlaart, *supra* (2003), p. 353. For Portugal, see Art. 483 *et seq.* of the Civil Code; further Ruiz, *supra* (1999), p. 234, fn. 38. For Spain, see Art. 1902 of the Civil Code; further Navarro Varona and Rating, *supra* (2000), p. 76. Compare also the - now outdated - study commissioned by the European Commission and co-ordinated by A. Braakman: European Commission, DG IV-Competition, *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States* (Brussels, 1997).

conferred only on persons within the “protective scope” of the statute, and stresses that any “person affected”, including competitors and “other market participants” can sue for damages.⁹⁰⁶ The law now also gives standing to associations for the promotion of commercial or independent professional interests, including consumer associations.⁹⁰⁷ One of the novel features is the fact that it is now possible for the courts to calculate the damages taking into account the proportion of the profit which the defendant has derived from the infringement.⁹⁰⁸ In addition, the passing-on defence is restrained, though not completely banned.⁹⁰⁹ Finally, German law goes even further than the UK law and confers a binding effect not only on European Commission and *Bundeskartellamt*, but also on all other EU Member States’ competition authorities infringement decisions. This binding effect is confined to follow-on civil litigation, basically aiming at offering incentives to claim damages from convicted cartelists.⁹¹⁰

As far as national case law is concerned, even before the latest developments, it would be exaggerated to deny the existence of tangible evidence referring to private enforcement through damages awards. As the Ashurst Study admits, there have been already in the past quite a few final judgments of national courts that have awarded damages to victims of anti-competitive practices.⁹¹¹ Then, more importantly, there have been cases, most of them unreported, where, just before the final judgment, parties settled before *quantum* was determined.⁹¹² The actual extent of these settlements may be hard to realise.⁹¹³

⁹⁰⁶ S. 33(1) GWB. See further below.

⁹⁰⁷ See Stockmann, “La réforme du droit allemand de la concurrence”, (2006) RLC n° 6 106, p. 112.

⁹⁰⁸ S. 33(3) GWB.

⁹⁰⁹ See below.

⁹¹⁰ See Hempel, *supra* (2004), p. 371; Moch, *supra* (2006), p. 41.

⁹¹¹ This appears to have been the case in France. See CA Paris, 30-9-98, *Mors*, (1998-12) *Europe* 17, where a damages award for FF 34.2 million was granted to the victim of an abuse of dominant position under French and Community competition law. The case concerned exclusionary practices that resulted in deterring the plaintiff from supplying the brakes system of certain Airbuses. For another case see T. Com. Paris, 22-10-96, *Ecosystem*, *op.cit.*, where the damages awarded amounted to a meagre FF 1.6 million. See further Idot, “La liberté de concurrence en France”, *Petites Affiches*, 23-3-2000, No. 59, 5, p. 7, who notes that French cases of non-contractual liability pertinent to violations of EC competition law have been rather rare, but seem to start developing. See also cases cited by Boulanger, *supra* (1997), p. 293; Fasquelle, “Les dommages et intérêts en matière anticoncurrentielle”, (2000-5/6) *Rev.Conc.Consomm.* 14. For a Dutch example, see Rechtbank Amsterdam, 14-5-75, *Wilkes v. Theal and Watts*, cited by Sevinga, *supra* (1994), p. 201, fn. 248. For an Italian case see Corte d’Appello Milano, 24-12-96, *Telsystem v. SIP-Telecom*, 2 *Danno e Responsabilità* (1997) 602, where Telsystem was awarded LIT 3 billion in damages for harm it suffered as a result of violations of the Italian anti-monopoly legislation by Italia Telecom. Germany too has been a jurisdiction with some success in private antitrust enforcement. See e.g. Bornkamm, “Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions”, in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 422, purporting that the US and Germany were probably the jurisdictions with the most private antitrust actions in the world.

⁹¹² See Jones and Sharpston, *supra* (1996-97), p. 87; Kerse, “The Complainant in Competition Cases: A Progress Report”, 34 *CMLRev.* 213 (1997), p. 247; Green, “Rapport britannique”, in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm,

Irrespective of the modesty or significance of these precedents, in the last years one can even speak of a boom of private antitrust enforcement in Europe.⁹¹⁴ As explained above, this undoubtedly is connected with the decentralisation of EC competition law enforcement and the expected more active role of national courts, but also with the more general drive in Europe for the enhancement of private enforcement. It thus seems that Regulation 1/2003 along with the *Courage* judgment of the Court of Justice constituted the “awakening call” that many proponents of private enforcement were expecting.⁹¹⁵

It is interesting to note that many of the recent cases, some of which are still pending, are follow-on cases. The *Vitamins* case is the most prominent source of such actions and there are already damages awards and settlements in Germany, England, Sweden and other jurisdictions.⁹¹⁶ A famous example has been the *Provimi* judgment decided at the admissibility stage by the English High Court, where apart from English parties, one German party was also claiming antitrust damages.⁹¹⁷ The *Vitamins* litigation provided also for the

1999), p. 61; Jones, “Litigating Competition Cases in the UK”, in: *Lawyers' Europe*, Spring 2002, 2. The financial implications of settlements can be quite similar to damages awards. For an English example, see *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* (QB), [1984] 1 CMLR 519; on appeal [1984] 2 CMLR 584, where a breach of Art. 82 EC was alleged, but the matter was settled by the payment of a substantial amount to the plaintiff. For a German example see the *Global One* case, where after the national court had accepted a claim of damages in its merits, the litigants settled (OLG Düsseldorf, 16-6-98, *British Telecommunications plc and VLAG Interkom GmbH & Co. v. Deutsche Telekom AG and ATLAS Deutschland*, 48 WuW (1998) 713).

⁹¹³ In the United States a study on private enforcement has found that between 1973 and 1983 more than 80 % of cases were settled, before any final damages award had been given by the courts. See Roach and Trebilcock, *supra* (1996), p. 466, referring to the Georgetown Private Antitrust Litigation Project.

⁹¹⁴ See e.g. Desai, “Antitrust Compliance Programmes: Act Now”, in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003), pp. 11-12, who also stresses the importance of compliance programmes with a view to minimising claims for damages in increasing private lawsuits.

⁹¹⁵ See Jones, *supra* (2003), p. 97; Goyder, *supra* (2003), p. 560.

⁹¹⁶ See Braun and Bader, “German Competition Law: Overview and Recent Developments”, in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003), p. 98.

⁹¹⁷ *Provimi Ltd. v. Aventis Animal Nutrition SA et al.* (QB (Com.Ct.)), [2003] ECC 353. Judgment was given only as to the jurisdictional issues and subsequently the parties settled. There, it was established that where there is an English connecting factor in the private international law sense, i.e. an English element to a cartel, other non-English claimants may also bring claims in London in respect of their non-English based losses, instead of having to pursue separate claims in other jurisdictions. *Provimi* follows a more permissive approach than that adopted recently by the US Supreme Court. There, in some cases of follow-on litigation, the District of Columbia and the Second Federal Circuits had held that under some conditions foreign plaintiffs could seek treble damages in US courts, even though injured exclusively outside the US: *Empagran SA et al. v. F. Hoffman La Roche, Ltd. et al.*, 315 F.3d 338 (DC Cir. 2003); *Krugman v. Christie's International plc*, 284 F.3d 384 (2d Cir. 2002). The main policy argument behind the granting of jurisdiction and standing in these two cases was the need to guarantee efficient deterrence. This was criticised as another example of US antitrust extraterritoriality. It was also viewed negatively in Brussels, because it would not leave space to the development of a European system of private enforcement. See e.g. Palmieri, “Tribunale mondiale antitrust a Washington?”, 3-4 Int'LLis (Autunno 2003) 140, pp. 143-144; Van Caenegem, “The Long Arm of the US Courts: The *Empagran* Decision”, in: *Liber Amicorum Jean-Pierre de Bandt* (Bruxelles, 2004), p. 645 *et seq.*; Guersent, “Table ronde : Les conséquences civiles et pénales dans un contexte d'internationalisation des programmes de clémence”, in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 GP n° 287-288 7 (2005), p. 56. Other US Circuits had rendered conflicting judgments. Thus, the Fifth Circuit in *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f. et al.*, 241 F.3d 420

first claims that were brought before the CAT as follow-on civil claims for damages under the special procedure of s. 47A of the UK Competition Act. These cases, however, did not lead to final judgments, since they were settled.⁹¹⁸

In Germany, the initial rejectionist approach of courts has now changed and the first successful follow-on damages claims in the *Vitamins* litigation are a reality. It is noteworthy that certain German courts adjudicating claims for damages in the post-*Courage* era refused to grant damages to direct purchasers of vitamins on passing-on grounds and because the cartel was not specifically directed at them but at all market participants.⁹¹⁹ This built on a very restrictive reading of standing under German law that was certainly incompatible with Community law and the *Courage* ruling in particular, which accepted no such limitations but granted a right in damages to all individuals harmed by the anti-competitive conduct.⁹²⁰ Recent German judgments, however, have reversed this restrictive approach and have rendered the first damages awards.⁹²¹

Important successful damages claims have also been reported in Austria, France,⁹²² Denmark,⁹²³ Spain,⁹²⁴ and Italy where the *Corte di Cassazione* after long tribulations

(5th Cir. 2001) denied US forum access to foreign plaintiffs, the Third Circuit in *Turicentro SA et al. v. American Airlines Inc. et al.*, 303 F.3d 293 (3rd Cir. 2002) held that they even lack standing in the first instance to file the action, while according to the Seventh Circuit in *United Phosphorus Ltd. et al. v. Angus Chemical Company et al.*, 322 F.3d 942 (7th Cir. 2003), US courts lacked subject-matter jurisdiction, unless the anti-competitive conduct had a direct, substantial, and reasonably foreseeable effect on domestic commerce. See on all these cases Pallek, "L'avenir de la coopération Euro-américaine dans le domaine de la concurrence", 40 CDE 95 (2004), pp. 103-104. The US Supreme Court finally resolved this question finding against US jurisdiction. According to the Supreme Court's ruling in *F. Hoffman La Roche, Ltd. et al. v. Empagran SA et al.*, 542 US 1 (2004), US courts lack jurisdiction over antitrust civil damages claims involving foreign injuries which are not related to domestic injuries arising out of the same anti-competitive act. The critical point is whether the foreign anti-competitive conduct causes independent foreign harm and whether that foreign harm alone results in the plaintiff's damage.

⁹¹⁸ See *Deans Foods Limited v. Roche Products Limited, F. Hoffman-La Roche AG and Aventis SA*, Case No. 1029/5/7/04, CAT Consent Order of 11 February 2005; *BCL Old Co. Ltd. DFL Old Co. Ltd. and PFF Old Co. Ltd. v. Aventis SA, Rhodia Ltd., F. Hoffman-La Roche AG and Roche Products Ltd.*, Case No. 1028/5/7/04, CAT Consent Order of 24 November 2005. See further Randolph and Robertson, "The First Claims for Damages in the Competition Appeal Tribunal", 26 ECLR 365 (2005). Currently, there is another case pending before the CAT: *Healthcare at Home Ltd. v. Genzyme Ltd.*, Case No. 1060/5/7/06. This is based on previous infringement decisions of the OFT/CAT in an abuse of dominance case concerning margin squeeze and rebates in the pharmaceutical sector. Interestingly, the plaintiff has also claimed exemplary damages.

⁹¹⁹ LG Mannheim, 11.7.03, 7 O 326/02 – *Vitaminskartell*, 106 GRUR 182 (2004); LG Mainz, 15.1.04, 12 HK O 56/02 (Kart) – *Vitaminpreise*, 54 WuW 1179 (2004).

⁹²⁰ See below on the issue of standing.

⁹²¹ LG Dortmund, 01.04.04, 13 O 55/02 (Kart) – *Vitaminpreise*, 54 WuW 1182 (2004). The damages awarded in this case amounted to the difference between the price paid as a result of the cartel and a hypothetical market price. In addition, the court ruled that the defendant failed to prove that the plaintiff had passed on his damage.

⁹²² CA Versailles, 24-6-04, n° 02/07434, *SA Verimedia v. SA Mediametrie et al.* The court awarded € 100,000 to the victim of an anti-competitive agreement (on the basis of French competition law). The damages awarded were rather low because *inter alia* of the plaintiff's contributory fault.

⁹²³ *GT Linien v. Danish Railways*, (*Global Competition Review*, Electronic Newsletter, 11 May 2005). The award of damages amounted to DKK 10 million plus interest and was upheld by the Danish Supreme Court.

established that consumers could claim damages from a cartel of insurance companies previously convicted by the Italian competition authority.⁹²⁵ In short, the picture is changing and the adoption of the Green Paper by the Commission is bound to further raise the awareness of courts, market participants and consumers.

kk. The Conditions of Civil Liability

i. Standing

The specific question who has standing to sue for damages in case of harm caused by an EC competition law violation is fundamental. It is also utterly connected with the broader question of the goals of competition law and policy, in particular whether competition law aims at safeguarding effective competition in the market or at protecting one's economic freedom. As we have explained above, even though the main scope of the Treaty competition provisions is the protection of free and undistorted competition in the common market, this has an indirect and reflexive bearing on private parties.

At the same time, the Treaty competition rules are enshrined in a text of constitutional nature and, together with the four freedoms, make up the Community's "economic constitution".⁹²⁶

⁹²⁴ Juzgado de lo Mercantil n° 5 de Madrid, 11-11-05, n° 36/2005, *Conduit Europe SA v. Telefónica de España SAU*. In that case, the court awarded the plaintiff, an Irish communication services provider, € 639,000 for losses incurred as a result of the defendant's abuse of dominant position, consisting of giving defective and incomplete information in order to block the plaintiff's entry into the market for subscriber directory enquiries. This was a "stand-alone" civil action.

⁹²⁵ Corte di Cassazione, 4-2-05, n° 2207, *Compagnia Assicuratrice Unipol SpA v. Ricciarelli*, 11 *Danno e Responsabilità* 495 (2005). This judgment was decided by the *Sezioni Unite* (a special chamber of an increased number of judges) of the *Corte di Cassazione*. It reversed a previous ruling of the same court that had denied standing to consumers in the same cartel (Corte di Cassazione, 9-12-02, n° 17475, *Soc. Axa Assicurazioni v. Isvap and Larato*, 9 *Danno e Responsabilità* 390 (2003)). See the heated debate in Italy between Libertini (in favour of consumers' standing) and Castronovo (in favour of a restrictive reading of the competition rules' protective scope): Castronovo, "Antitrust e abuso di responsabilità civile", 10 *Danno e Responsabilità* 469 (2004); Libertini, "Ancora sui rimedi civili conseguenti a violazioni di norme antitrust", 10 *Danno e Responsabilità* 933 (2004); Castronovo, "Responsabilità civile antitrust: Balocchi e profumi", 10 *Danno e Responsabilità* 1165 (2004); Libertini, "Ancora sui rimedi civili conseguenti ad illeciti antitrust (II)", 11 *Danno e Responsabilità* 237 (2005).

⁹²⁶ See *inter alia* J. Baquero Cruz, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (Oxford/Portland, 2002). See also K.T. Yannakopoulos, *The Opacity Required by the Effective Competition in EC Public Procurement Law* (Athens/Komotini, 2003) [in Greek], p. 12; Oliver, "Les quatre libertés et les droits fondamentaux", in: Vandersanden & de Walsche (Eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. I (Bruxelles, 2003), p. 357; Nowak, "Das Verhältnis des Wettbewerbsrechts und der Grundfreiheiten im Binnenmarkt", in: Hatje & Terhechte (Eds.), *Das Binnenmarktziel in der Europäischen Verfassung* (Baden-Baden, 2004), p. 82 *et seq.* Briand-Mélédou, "Droit de la concurrence, droit constitutionnel substantiel de la communauté européenne", 57 *RTDComm.* 205 (2004), pp. 205-208. It is interesting to note that US antitrust, though formally not part of the US Constitution, is also considered to enjoy such "constitutional" status by the US Supreme Court. Compare *United States v. Topco Associates Inc.*, 405 US 596 (1972), at 610, referring to the Sherman Act as "the Magna Charta of free enterprise".

Indeed, this pre-eminence of the competition rules was left untouched during the drafting of the new European Constitution. It was initially thought that such provisions had no place in a programmatic constitutional text, but there were fears that omitting the competition and free movement rules from that text might be construed as a shift away from those classic Community priorities, and thus as a “devaluation”.⁹²⁷ The approach finally followed defers to the long-standing constitutional importance of competition law; indeed, there are good reasons to speak of an “up-grading”.

Thus the new European Constitution lists competition law among the guiding principles and objectives of the Union. Article I-3(2) of the Constitution stresses that “the Union shall offer *its citizens* an area of freedom, security and justice without internal frontiers, and an internal market *where competition is free and undistorted*.”⁹²⁸ Including the principle of free competition among the Union’s paramount objectives certainly goes further than the equivalent provision of Article 3(1)(g) EC.⁹²⁹ Then, the constitutional nature of competition law is now celebrated in the primary principles of a formal *constitution*.⁹³⁰ In addition, the new text constitutes progress because it refers to the principle of free competition positively (“where competition is free and undistorted”), rather than negatively as in the current EC Treaty (“a system ensuring that competition in the internal market is not distorted”). A further extremely important innovation of the Constitution is the portrayal of competition policy as the “fifth freedom” in the chapter on the internal market.⁹³¹

This short introduction to the constitutional parameters of EC competition law serves in order to define the rules on standing for damages claims. A restrictive view of standing would offend against the constitutional status of the Treaty competition rules and would create obstacles to individuals’ reliance on rights derived from a constitutional text. Indeed, as

⁹²⁷ See Oliver, *supra* (2003), p. 357; *idem*, “Competition and Free Movement: Their Place in the Treaty”, in: Tridimas & Nebbia (Eds.), *European Union Law in the Twenty-First Century, Rethinking the New Legal Order*, Vol. II, *Internal Market and Free Movement Community Policies* (Oxford/Portland, 2004), p. 159, quoting the Former President of the ECJ Gil Carlos Rodríguez Iglesias.

⁹²⁸ Emphasis added.

⁹²⁹ See e.g. Nowak, *supra* (2004), p. 92. See, however, Poillot-Peruzzetto, “Concurrence et constitution”, 15(5) *Contr. Conc. Consomm.* 3 (2005), arguing that the constitutional status of the competition rules may have been diminished or “relativised” in the European Constitution. See also Behrens, “Das wirtschaftsverfassungsrechtliche Profil des Konventsentwurfs eines Vertrages über eine Verfassung für Europa”, in: Fuchs, Schwintowski & Zinner (Eds.), *Wirtschafts- und Privatrecht, Im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung, Festschrift für Ulrich Immenga zum 70. Geburtstag* (München, 2004), pp. 25 and 32-33, stressing also the reference in Art. I-3(2) of the Constitution to “soziale Marktwirtschaft”, which seems to depart from a purist competition law approach.

⁹³⁰ See Terhechte, *supra* (2004b), p. 125.

⁹³¹ See former Commissioner Monti’s last official speech, “A Reformed Competition Policy: Achievements and Challenges for the Future”, Speech Delivered at the Center for European Reform (Brussels, 28 October 2004), in: <http://europa.eu.int/comm/competition/speeches>.

Clifford Jones has persuasively explained, EC competition law is in this sense different from US antitrust law and the latter's prudential mechanisms and its restrictive rules on standing cannot be automatically transposed to the EC context.⁹³²

This is important because many national laws have contained restrictive rules on standing for competition law-related damages actions. We have already seen that English courts followed a rather restrictive approach of the persons that had such a standing to sue. Co-contractors were excluded, while the position of consumers was equally unclear. In continental legal systems, the question of damages for competition law infringements has more or less been clear in jurisdictions following the unitary norm system of the French Civil Code (Article 1382),⁹³³ where the sweeping and general nature of the national rule on civil liability allows for a liberal approach with regard to standing, but problems have existed in countries following the German doctrine of *Schutznorm*,⁹³⁴ whereby plaintiffs claiming damages have to belong to a group of persons that the legislator intended protecting.

The question *whether* Articles 81 and 82 EC can be considered as statutes for the protection of individuals and private interests - or as analogous to such - has been answered in the affirmative both by courts⁹³⁵ and commentators.⁹³⁶ The real question is *which* persons fall under this protective scope. While the position of competitors has been clear, some of the legal systems belonging to the Germanic legal family (as far as tort liability is concerned) have encountered difficulties with the position of purchasers and consumers. Thus, until the

⁹³² Indeed, that author would prefer national courts to engage in an approach, which would follow the "legitimate interests" test incorporated in the old Reg. 17/1962 with reference to complaints (Jones, *supra* (1999), p. 190).

⁹³³ The position of French law is unique because it provides for a separate specific legal basis for damages actions: Art. L442-6 *Code de commerce*. This is of limited scope and is applicable to harm caused by the commission of certain enumerated acts. It is a rather atypical provision, since it gives title to sue for damages, apart from the victims, to the public prosecutor, the Minister of the Economy and the president of the *Conseil de la concurrence*, acting on behalf of the victims. This extraordinary provision that has been characterised as "bizarrie juridique" stresses, nevertheless, the will of the French legislator to view damages suits as an instrument of market policing (see further Boulanger, *supra* (1997), p. 197; Claudel, "Concurrence : Projet de loi sur les nouvelles régulations économiques", 53 RTDComm. 606 + 877 (2000), pp. 896 and 898; Lucas de Leyssac and Parleani, *supra* (2002), pp. 955, 975). A question is whether these damages actions can be brought also in cases of harm caused by the violation of *Community* competition law, when the anti-competitive practice takes the form of one of the enumerated acts in Art. L442-6. While Art. L470-6 empowers the Minister of the Economy and the French competition authority to use all means provided for by the law to enforce *Community* law, it appears that the atypical action of Art. L442-6 is not covered.

⁹³⁴ This doctrine is also followed by Austrian, Dutch, and, up to a certain extent, Italian and Greek law. The question concerning the protective scope (*Schutzzweck*) of Arts. 81 and 82 EC is one of *Community* law and the ECJ has the ultimate competence to interpret this. See in this direction Schröter, *supra* (2003), p. 328.

⁹³⁵ In Germany see BGH, 23.10.79 - KZR 21/78, 30 WuW 191 (1980).

⁹³⁶ See e.g. Temple Lang, *supra* (1984), p. 221 *et seq.*; Waelbroeck and Frignani, *supra* (1999), pp. 529-530; Steindorff, "Aufgaben und Zuständigkeiten im europäischen Kartellverfahren", 162 ZHR (1998) 290, pp. 306-309; Maitz-Strassnig, *supra* (1999), p. 35; Günther, *supra* (2001), p. 320; Lever, "Substantive Remedies: The Viewpoint of an English Lawyer", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 109.

latest amendment of the German Competition Act, standing to sue for damages was conferred only on persons within the “protective scope” of the law. This was the case both for German and Community competition law.⁹³⁷ As already mentioned, the new s. 33(1) GWB, which now applies both to German and to Community competition law, has relaxed the rules on standing by referring to “affected persons”, including competitors and “other market participants”, although it is still not entirely clear that consumers will always be admitted.

Consumers were also excluded until recently from the category of persons having title to sue for antitrust damages in Italy, due to a restrictive reading of the protective scope of national tort law provisions, but again this has been remedied. Then, some other national laws contain equally restrictive provisions. Thus, Article 18a of the Finnish Competition Act, which has since 2004 been made applicable also to Article 81 and 82 EC infringements, gives standing to sue only to “business undertakings”, therefore, consumers are excluded.

Irrespective of these national provisions dealing with standing to sue, we submit that Community law in the post-*Courage/Manfredi* era defines *itself* the constitutive conditions of the right in damages. The rules on standing clearly fall under these conditions. Indeed, in *Courage*, the Court had no difficulty in finding that Article 81 EC did not only protect third-party competitors, in that case third-party beer suppliers foreclosed by a specific network of exclusive beer supply agreements, but could also be relied upon by “any individual”,⁹³⁸ including co-contracting parties, in that case tenants.⁹³⁹ *Manfredi*, as we developed above, built on *Courage* and defined in detail the Community law constitutive condition of standing, explicitly recognising that consumers enjoy standing to sue for harm caused to them by anti-competitive conduct.⁹⁴⁰ Such a principle can also be adduced from the letter of Article 81(3) EC, which speaks of “allowing *consumers* a fair share of the resulting benefit”.⁹⁴¹

Therefore, if the unequivocal words used in *Courage* as to the very existence of a right in damages in Community law for all harmed individuals had rendered redundant⁹⁴² any effort to make a distinction, based on the “protective scope” of Articles 81 and 82 EC, between co-contractors,⁹⁴³ competitors, consumers, purchasers (direct or indirect)⁹⁴⁴ and other third

⁹³⁷ The old s. 33 GWB provided so for damages claims based on German competition law, while s. 823(2) BGB led to the same result for claims based on Community competition law.

⁹³⁸ *Courage*, *op.cit.*, para. 26.

⁹³⁹ See Brealey, “Adopt *Perma Life*, but Follow *Hanover Shoe* to *Illinois*? Who Can Sue for Damages for Breach of EC Competition Law”, 1 Comp.LJ 127 (2002), p. 128.

⁹⁴⁰ *Manfredi*, *op.cit.*, paras. 60, 61, 63.

⁹⁴¹ Emphasis added.

⁹⁴² See Van Gerven, *supra* (2005b), p. 8.

⁹⁴³ Bar cases where a co-contractor bears a significant degree of responsibility for the violation of competition law (*Courage*, *op.cit.*, para. 31). This however is not a question of standing, falling under the

parties,⁹⁴⁵ following *Manfredi*, we can now indeed say that such distinctions are incompatible with Community law and, pursuant to the principle of supremacy, should be set aside. The current state of the law is that, irrespective of the protective scope of the competition law provisions, all private parties that have been harmed by an anti-competitive practice enjoy a *Community law-based right* in damages.⁹⁴⁶ Community law itself elevates these private parties into the guardians of free competition in the European Union, i.e. into a “private attorney-general”.

ii. Fault

Another basic question is whether liability for damages for breach of Articles 81 and 82 EC presupposes fault or whether it is strict. The answer to this question is clearly that it is only strict liability that renders meaningful the prohibitions of those Articles.⁹⁴⁷ The Treaty rules on competition do not generally require subjective intent to contravene the relevant prohibitions,⁹⁴⁸ therefore civil liability for EC competition law breaches should not be based upon such a condition.

Community law-defined constitutive conditions of the right in damages, but rather one of contributory fault, falling under the – for the time being – national law-defined executive conditions of the right in damages.

⁹⁴⁴ As to the so-called “indirect purchasers” standing, see below.

⁹⁴⁵ Whether shareholders or other persons related to a company that has breached the antitrust rules, such as employees, can sue for damages, is debated. See Brealey, *supra* (2002), p. 134. In our view, the broad language in *Courage* should cover these persons, too, assuming they can identify and prove harm and, more importantly, causation. Compare, however, indicatively case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel et al. v. Commission*, [1995] ECR II-1247, para. 50, denying standing to challenge a merger clearance decision to the employees of an entity that would be divested by one of the merging parties, as part of a structural commitment. According to the CFI, a decision authorising a merger on the basis of Community competition law, even if it makes that merger subject to the sale by one of the undertakings in question of part of its activities to a third undertaking, does not in itself have any effect on the own rights of the representatives of the employees of the undertakings concerned.

⁹⁴⁶ The ECJ case law, starting from *BRT v. SABAM I*, does not allow for differentiations based on the protective scope of Arts. 81 and 82 EC. See also *GT-Link*, *op.cit.*, para. 57 and *Guérin Automobiles*, *op.cit.*, para. 39, where clearly the ECJ considered that individuals enjoyed rights conferred upon them by the direct effect of the Treaty competition rules and not because the pertinent provision was specifically designed to protect them. See, in this direction, Steindorff, *supra* (1996), p. 307, who rightly stresses that Community law never centres on the protective scope of a provision, but rather on whether that provision has direct effect and gives rise to rights and obligations. On the broader question see Ruffert, “Rights and Remedies in European Community Law: A Comparative View”, 34 CMLRev. 307 (1997).

⁹⁴⁷ See in this sense Temple Lang, *supra* (1999), p. 277; Jones and Sufrin, *supra* (2004), p. 1219.

⁹⁴⁸ With regard to Art. 81 EC, the critical factor is the *objective* meaning and purpose of the agreement in its economic context, while the *subjective* intention of the parties is immaterial. Vice versa, an agreement might not have as its object the restriction of competition merely because the parties subjectively aimed at this. In Art. 82 EC, again, abuse is an objective concept and the intention of the dominant undertaking is irrelevant. However, exceptionally, intention may play a role in establishing an abuse of dominant position in predatory pricing cases and in cases, where the abuse takes the form of vexatious litigation, which is part of a systematic campaign or strategy of the dominant undertaking to intimidate, harass, and exhaust competitors by raising unreasonably

Of course, we must distinguish conceptually between fault in the context of the *anti-competitive conduct* and fault in the context of *civil liability* and *civil damages*. Although interconnected, the two questions are different. The Court of Justice in *Courage* stressed this conceptual difference in the following terms:

“Contrary to the submission of *Courage*, making a distinction as to the extent of the parties’ liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article [81] of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function. That case-law concerns the conditions for application of Article [81] of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.”⁹⁴⁹

It is the second context that we deal with here, i.e. whether culpability should play a role for the establishment of civil liability flowing from a proven antitrust violation, and the answer is that it should not. In all such cases, liability for EC competition law violations is strict. Indeed, the requirement of intention or negligence for the imposition of fines and periodic penalty payments by the Commission or national competition authorities in the context of administrative public enforcement should be distinguished, because such penalties do not aim at compensating the victims of the anti-competitive practices but rather at punishing and deterring their perpetrators.⁹⁵⁰ Civil liability, on the other hand, while also containing deterrence and punitive elements, predominantly compensates the harm caused by anti-competitive conduct, and this harm should not be compensated only in cases of the perpetrator’s fault.

This differentiates individual civil liability for violation of Community competition law from its older sibling, state liability, which arises only where the Member State has committed a “sufficiently serious breach” of Community law.⁹⁵¹ There is, however, no compelling reason for accepting such a requirement in individual liability cases. Indeed, as some authors argue, there are inherent features in state liability, which justify and necessitate the “sufficiently serious breach” condition, but that cannot be transposed to individual liability for Community

their costs. For another recent Art. 82 case where intention seems to play an important role as a constituent element of the abuse, see Commission Decision of 15 June 2005 (*AstraZeneca*).

⁹⁴⁹ *Courage*, *op.cit.*, para. 35. The Court was of course dealing in that specific case with the issue of the plaintiff’s contributory fault (see below), but its clear distinction between fault for the establishment of the antitrust violation and fault for the civil liability is of general importance.

⁹⁵⁰ See Art. 23 Reg. 1/2003 with regard to fines. The same is accepted also for periodic penalty payments.

⁹⁵¹ *Brasserie du Pêcheur/Factortame III*, *op.cit.*, paras. 51, 55 *et seq.*

law violations.⁹⁵² Such a limitation has been imposed on public policy grounds in order to limit the liability of Member States when acting in their sphere of legislative discretion. On the other hand, when Member States do not enjoy legislative discretion, liability according to the Court of Justice is strict.⁹⁵³ Therefore, strict liability is more adequate for all breaches of the Treaty competition rules.⁹⁵⁴

This principle is followed in the Commission's Green Paper⁹⁵⁵ and has recently been solemnly recognised by the Court of Justice in *Manfredi*, which enumerated the constitutive conditions of individual civil liability but left the requirement of fault out.⁹⁵⁶ This sits in stark contrast to some national laws, such as the German and Swedish Competition Acts, which require intention or negligence for a right in damages to arise.⁹⁵⁷ Some form of fault is also required in Finnish,⁹⁵⁸ Austrian,⁹⁵⁹ Danish, and Greek law. While national law can provide for detailed "executive" rules of the right in damages, these rules cannot go as far as affecting the constitutive conditions of individual civil liability, as set out in *Courage* and *Manfredi*, by adding stricter criteria based on the nature or degree of the infringement or fault. Such restrictive conditions are plainly incompatible with the specific constitutive conditions of the Community right in damages. This is not really a question of national remedial/procedural autonomy, to be dealt with under the Community principle of effectiveness, but rather a direct question of supremacy of Community over national law.

The recent *Traghetti del Mediterraneo* case which deals with Member State liability for infringement of Community law by national supreme courts, is indicative of this importance difference.⁹⁶⁰ There, the Court of Justice had to decide on the compatibility with Community

⁹⁵² See Saggio, *supra* (2001), p. 242.

⁹⁵³ Case C-5/94, *Regina v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, [1996] ECR I-2553, para. 28.

⁹⁵⁴ See in this sense Mail-Fouilleul, *supra* (2002), p. 592; Winckler, *supra* (2003), p. 128; Van Gerven, "Harmonization of Private Law: Do we Need it?", 41 CMLRev. 505 (2004), p. 522. See also T. Com. Paris, 22-10-96, *Sté Ecosystem v. SA Automobiles Peugeot*, commented by Idot, (1996-12) *Europe* 17, where the existence of fault resulted from the mere fact that Arts. 81 or 82 EC were infringed. See also T. Com. Nanterre, 11-5-06, *Arkopharma v. Roche SA and Hoffmann La Roche SA*, n° RG 2004F02643, reported by Debroux, Sept. 2006, Vol. I, *e-Competitions*, in: <http://www.concurrences.fr>. The claim eventually failed because of the passing-on defence and of absence of causal link, but it is interesting that the court considered that the Commission's infringement Decision in the *Vitamins* cartel was enough to establish the defendant's fault. It is not clear from this judgment whether the court merely confused the separate concepts of fault as to the infringement of the competition rules and fault as to the harm, or whether it implied that the second kind of fault is not one of the conditions for civil liability to arise in such cases.

⁹⁵⁵ Staff Working Paper, paras. 101-108.

⁹⁵⁶ *Manfredi*, *op.cit.*, para. 61.

⁹⁵⁷ S. 33(3) GWB; Art. 33(1) of the Swedish Competition Act.

⁹⁵⁸ Art. 18a(1) of the Act on Competition Restrictions of 1992, as amended in 2004.

⁹⁵⁹ See Eilmansberger and Thyri, *supra* (2004), p. 54.

⁹⁶⁰ Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, Judgment of 13 June 2006, not yet reported.

law of an Italian rule that limited state liability solely to cases of intentional fault and serious misconduct on the part of courts. Rather than examining the Italian rule through the dual system national autonomy-Community law effectiveness, the Court stressed that national law could not interfere with the Community principle established by *Köbler*, according to which the manifest infringement of the applicable Community law by a national supreme court exceptionally leads to state liability for damage caused to individuals by reason of that infringement.⁹⁶¹ Thus, according to the Court, “under no circumstances may [national] criteria impose requirements stricter than that of a manifest infringement of the applicable [Community] law, as set out in paragraphs 53 to 56 of the *Köbler* judgment”.⁹⁶² In other words, when Community law itself defines the constitutive conditions of a specific Community right, it is not open to national law to restrict the exercise of that right. Transposing these principles to the case of individual civil liability for EC competition law violations, national requirements or conditions of fault are incompatible with Community law and must therefore be set aside by national courts.

iii. Defences

A further issue that should be examined here is the extent to which individual civil liability may be blocked by having recourse to general principles that in all legal systems allow the defendants to invoke specific legal defences. Most of these legal defences have to do with the degree of the plaintiff's contributory fault or with *force majeure*.⁹⁶³

As mentioned above, while neither the anti-competitive conduct as such nor the establishment of civil liability is dependent on fault, in some cases the degree of the plaintiff's culpability may affect the degree of the defendant's civil liability. We stress again that the significant or non-significant responsibility of a plaintiff (e.g. a co-contractor) in view of the assessment of his contributory fault in the context of the liability in damages (a question of civil law), should not be confused with the question of participation of each undertaking in an anticompetitive agreement (question of competition law). Indeed, the fact that a party may claim damages against his co-contractor because he may not have the same

⁹⁶¹ *Köbler*, *op.cit.*, paras. 53-56.

⁹⁶² *Traghetti del Mediterraneo*, *op.cit.*, para. 44.

⁹⁶³ This question is not usually addressed by the competition law literature. For a rare exception see Winckler, *supra* (2003), p. 130 *et seq.*

degree of responsibility is immaterial for the establishment of a violation of Article 81 EC and the finding of an anti-competitive agreement.⁹⁶⁴

Of course, damages claims as between co-contracting parties have been made easier after the Court of Justice recognised in principle in *Courage* that under Community law there is a right in damages for any harm caused by anti-competitive conduct, notwithstanding the fact that plaintiff and defendant may have been parties to the illegal agreement. However, national laws may take into account in this process the plaintiff's or a third party's fault. The victim of the anti-competitive behaviour must, therefore, diligently make an effort to minimise his damage.⁹⁶⁵ Contributory fault as a bar to civil liability is, indeed, a principle that already exists under Community law and indeed in most Member States' legal systems.⁹⁶⁶

The Court of Justice in *Courage* has made a reference to the legal systems of the Member States to derive therefrom a common principle precluding a litigant from profiting from his own unlawful conduct. The Court has stressed, however, that the responsibility of the person concerned for the violation of Community law must be "significant".⁹⁶⁷ In assessing a party's responsibility, the national court could, according to the Court of Justice, take into account a series of parameters: the economic and legal context of each case, the respective bargaining power and conduct of each of the co-contractors, whether a party is in such a substantially weak position that it cannot negotiate the contractual terms freely, and the cumulative effects on competition of any other similar contracts, if parts of a network.⁹⁶⁸

⁹⁶⁴ Some commentators confuse these two questions and see *Courage* as incompatible with earlier case law on the concept of agreements. See e.g. Mertikopoulou, "The Shift of the Treatment of Cartel Participants Infringing Article 81 EC and the Recent Tendencies of the Fining Policy of the European Commission", 9 *Dikaio Epicheiriseon kai Etairion* 43 (2003) [in Greek], p. 50. According to standard ECJ, CFI and Commission case law, an undertaking may bear responsibility (in the competition law sense) and form part of an anti-competitive agreement, irrespective of the degree of its participation in all or some cartel meetings or of its specific intention, as long as the former took part in one or some of the cartel's constituent elements, thus being part of an overall plan to restrict competition (see e.g. cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV et al. v. Commission*, [1999] ECR II-931, paras. 772-773; upheld on appeal in cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99, *Limburgse Vinyl Maatschappij NV (LIM) et al. v. Commission*, [2002] ECR I-8375, paras. 520-522, 586-587).

⁹⁶⁵ Efforts to minimise damage must be distinguished from efforts to defend oneself against specific behaviour, as would be the case, for example, with a competitor that is being excluded from a specific market by a dominant undertaking. If such successful defence were possible, then this might mean that there was no dominant position in the first place, since the competitor could always use alternative channels to enter that specific market.

⁹⁶⁶ See Van Gerven, *supra* (2003a), p. 59. Indeed, the fact that the *Köbler* state liability principle is only limited to violation of Community law by *supreme* courts, can also be seen as recognition by the ECJ of the principle of contributory fault in the sense that individuals should not be able to seek damages in cases where they did not try to challenge in a higher court the lower court's violation of Community law.

⁹⁶⁷ *Courage*, *op.cit.*, para. 31.

⁹⁶⁸ *Courage*, *op.cit.*, paras. 32-34.

Apart from cases of contributory fault, damages claims may in certain circumstances fail, if they are exercised in an abusive manner. Indeed, the prohibition of abusive exercise of rights is a principle that is common among EU Member States in one form or the other. On this issue, the Court of Justice was seized with a series of cases referred by Greek courts.⁹⁶⁹ The Court's response has been that, while a national doctrine of prohibition of the abusive exercise of rights must not be an obstacle to the exercise of Community law rights, the abuse of rights is also prohibited under Community law. In that sense, such a doctrine constitutes a general principle of Community law.⁹⁷⁰ Therefore, in such cases, it is not appropriate to speak of a conflict between national and Community law, but rather of a conflict between two rules of Community law, i.e. the general principle of the prohibition of the abusive exercise of Community law rights and the specific Community rule at issue.⁹⁷¹

A Community law-based right will be exercised in an abusive manner, if the right holder has not acted in good faith and he disproportionately and unreasonably restricts other persons' rights and if the exercise of that right does not correspond to the objective pursued by the relevant Community provision (teleological interpretation).⁹⁷² While the primary responsibility for the adjudication of this point remains at the hands of national courts, the latter cannot employ the abuse of rights doctrine in order to essentially weaken the effectiveness of Community law. In all such cases they are well advised to seize the Court of Justice through an Article 234 EC preliminary reference, so that the supremacy of EC law is not impaired.

A further defence that can be raised against an action for damages is that there may have been a national regulatory rule that approved of, encouraged or even imposed the problematic conduct in question. While the existence of such a national regulatory framework does not affect a finding of infringement under the Treaty competition rules, it certainly affects liability for losses occurred as a result of such anti-competitive conduct.⁹⁷³ In other words,

⁹⁶⁹ See e.g. Case C-367/96, *Alexandros Kefalas et al. v. Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon*, [1998] ECR I-2843; case C-373/97, *Dionisios Diamantis v. Elliniko Dimosio and Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE*, [2000] ECR I-1705.

⁹⁷⁰ See Stathopoulos, *supra* (2003), p. 523.

⁹⁷¹ See in this sense A.S. Georgiades, *General Part of Civil Law* (Athens/Komotini, 2002) [in Greek], pp. 270-271; Engsig Sorensen, "Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?", 43 CMLRev. 423 (2006), pp. 439-440.

⁹⁷² See I. Karakostas and E. Yannopoulou, *Community Law Rules and National Civil Law, Problems-Legislation* (Athens, 1997) [in Greek], pp. 43-44. See also case C-110/99, *Emsland Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, [2000] ECR I-11569, which seems to require two elements for a finding of abuse of right: one objective (i.e. it must be evident that the intended objective of Community law cannot be achieved) and one subjective (i.e. subjective abusive intention). See further Weber, 31 LIEI 43 (2004), p. 51 *et seq.*

⁹⁷³ See in this sense Temple Lang, "European Competition Policy and Regulation: Differences, Overlaps, and Constraints", Speech Made at the 3rd Antitrust Conference Organized by Ecole des Mines de Paris (Cerna)

interference by national regulatory rules does not mean that Articles 81 and 82 EC will not be applicable, possibly in combination with Article 10 EC, but national regulation can be a defence against actions for damages.

iv. Passing-on Defence

Certainly the most-discussed defence that can be put up against a damages action is the so-called passing-on defence, whereby the defendant claims that the plaintiff has passed his losses on to his customers and perhaps ultimately the consumers, so an award for damages would amount to unjustified enrichment. The passing-on defence, if given a broad reading, can be a fatal blow to any private antitrust enforcement action and some competition laws have taken a policy position to disallow or restrict it. This has been the case in US⁹⁷⁴ and recently in German law, although the German position is more nuanced.⁹⁷⁵

General Community law, on its part, is not particularly receptive to the passing-on defence. In cases concerning unduly paid sums by traders to Member States in violation of Community law, the national authorities invariably argue that a repayment order would amount to unjustified enrichment because the traders have passed these charges on to the consumer. Thus, the Court of Justice has held that although in principle the passing-on claim may indeed have sound grounds, "as that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person".⁹⁷⁶ Thus,

"the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person[,] can be established only following an economic analysis in which all the relevant circumstances are taken into account".⁹⁷⁷

Advocate General Tesauro has encapsulated the Community judicature's negative predisposition towards this specific defence in the following terms:

and University of California at Berkeley School of Law (Paris, January 12th-13th, 2006), p. 31, fn. 43, stressing that no claim for damages can be made for loss caused by conduct that was not prohibited by a regulatory rule when it occurred.

⁹⁷⁴ See the US Supreme Court's landmark judgment in *Hanover Shoe v. United Shoe Machines Corp.*, 392 US 481 (1968).

⁹⁷⁵ See below.

⁹⁷⁶ *Weber's Wine*, *op.cit.*, para. 95.

⁹⁷⁷ *Ibid*, para. 100.

“I do not in fact believe it can be right to describe as unjust enrichment the profit derived by an individual from the reimbursement of a charge unduly required and levied by the authorities. More especially, I do not believe that the State, which itself has actually obtained unjust enrichment by levying - for years, even - an unlawful charge, may then specifically rely on a principle of that kind to refuse to repay the sums unduly paid.”⁹⁷⁸

The question of the link between the passing-on defence and unjustified enrichment was recently given a fresh look by Advocate General Geelhoed, again in a case involving restitution of unduly paid taxes and levies.⁹⁷⁹ The Advocate General followed an economic analysis and reached the conclusion that it is very difficult in a dynamic market environment to demonstrate a direct link between a charge increasing the cost price and the price. Besides, even if this were possible, it still does not mean that the taxpayer is compensated fully for the extra costs of the charge. In other words, passing on the charge is different from passing on the economic loss or damage caused to the trader as a consequence of the unlawfully imposed charge. Such a loss might relate, in particular, to loss of competitiveness and to a drop in the volume of sales and thus in market share and profit.

According to the Advocate General, the degree to which amounts are passed on depends primarily on the price elasticity of demand. Only in the extreme event that the price elasticity of demand amounts to zero, will it be possible to pass on the charge to the customer in full by means of a price increase. However, in the case of the vast majority of products demand is more or less price elastic. The Advocate General concluded:

“These considerations lead me to the conclusion that it will be virtually impossible to demonstrate the degree to which the economic burden resulting from the charge has been passed on. In order to do so it is necessary to conduct a thorough analysis of the market, taking into account a large number of variables such as the structure of the market concerned (more or fewer providers) and the availability of possible substitutes for the product affected by the charge. Account must also be taken of the fact that market conditions are dynamic in nature and that prices fluctuate according to changes in supply and demand. This makes it particularly difficult to establish what effect a charge has on the level of the retail price. In order to establish that effect it

⁹⁷⁸ Cases C-192/95 to 218/95, *Sté Comateb et al. v. Directeur Général des Douanes et Droits Indirects*, [1997] ECR I-165, AG's Opinion, para. 21. Compare also para. 14 of AG Mancini's Opinion in *San Giorgio*, *op.cit.*

⁹⁷⁹ Para. 73 *et seq.* of AG's Opinion in case C-129/00, *Commission v. Italy*, *op.cit.*

would ultimately be necessary to establish how the prices and the sales would have developed if no charge had been imposed.”⁹⁸⁰

This analysis can be easily transposed to the situation where the passing-on defence is raised between private litigants in a private antitrust enforcement action. There is no reason to protect the perpetrator of a serious competition law violation, who has for some time enjoyed the anti-competitive gains, to the detriment of the victim of the anti-competitive practices, just because the surcharge may have been passed on. There is an element of deterrence here that should not be missed. Besides, as Advocate General Geelhoed rightly stresses, “the fact that the causal link between recovery and enrichment is relative where an amount is passed on is also clear from the opposite situation, that is to say that it cannot be ruled out that the economic operator concerned will likewise be able to pass on the advantage of recovered charges to the final consumer by using the recovery to reduce prices with a view to maintaining or strengthening his market position.”⁹⁸¹

The above, however, does not mean, in our view, that the passing-on defence is or should be prohibited as a matter of Community law or that the mere existence of such a defence runs counter to the principle of effectiveness of Community law generally or of competition law enforcement specifically.⁹⁸² Unlike the US where the passing-on defence is expressly barred by the *Hanover Shoe* line of cases,⁹⁸³ the – admittedly non-competition law-specific – case law of the European Court of Justice is more nuanced and prefers to deal with the issue on an *ad hoc* basis.⁹⁸⁴ In reality the Court’s approach is to refer to national law, while stressing that a general principle of prohibition of unjustified enrichment exists also under Community law, and to subject this defence to the demanding Community law limits of equivalence and effectiveness.⁹⁸⁵ In sum, the words of Advocate General Jacobs in *Weber’s Wine* can be

⁹⁸⁰ *Ibid.*, para. 78.

⁹⁸¹ Case C-129/00, *Commission v. Italy*, *op.cit.*, AG’s Opinion, para. 79.

⁹⁸² See in this direction Beard, *supra* (2005), p. 274.

⁹⁸³ The main reasons for the US Supreme Court’s rejection of the passing-on defence are (a) the fact that private actions and litigation would be extremely complicated, since it would be an insurmountable task to trace the exact effects of the anti-competitive overcharge, and (b) the risk that the offender might, at the end of the day, retain its unlawful profits.

⁹⁸⁴ Compare cases 331/85, 376/85 and 378/85, *SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des Douanes et Droits Indirects*, [1988] ECR 1099, para. 17: “Even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence.”

⁹⁸⁵ Compare case 68/79, *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, [1980] ECR 501, para. 26: “The protection of rights guaranteed in the matter by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those

transposed to this situation: Community law does not allow an unqualified passing-on defence but for such a defence to be successful “it must also be established that unjust enrichment would ensue”.⁹⁸⁶ In the same direction, the Commission’s Green Paper on damages goes on to say:

“It can be said that there is no passing on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on (which can be difficult in itself) and (2) proof of no reduction in sales or other reduction to income.”⁹⁸⁷

A similar approach is followed in the latest amendment of the German Competition Act. The new section 33(3) GWB, instead of totally excluding the passing-on defence, merely provides that “if a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service”. In reality, German law provides that the burden of proof falls on the defendant.

From the above it is clear that the recognition of the passing-on defence by national law is not in principle incompatible with Community law and does not offend against its effectiveness. It is rather restrictive national rules imposing a heavy burden of proof on plaintiffs in this regard that may impair the effectiveness of Community law. More interesting is the question of the interrelationship between the possible permission of the passing-on defence and the standing of so-called “indirect purchasers”.

v. Standing of Indirect Purchasers and Consumers

The question of the standing of indirect purchasers⁹⁸⁸ is closely connected with the prohibition or permission of the passing-on defence. Standing of indirect purchasers is indeed referred to at times as “offensive passing-on”.

entitled. There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers”.

⁹⁸⁶ *Weber's Wine, op.cit.*, AG’s Opinion, para. 49.

⁹⁸⁷ Commission Staff Working Paper, para. 173.

⁹⁸⁸ A more basic distinction can be made between primary and secondary victims. A primary victim is the person that did not buy at all because the anti-competitive price was above his reserve price. A secondary victim is a person that did buy albeit at the anti-competitive price. An attempt to identify the first is futile and it seems that even in the US there has never been a case where damages were awarded to a primary victim. So the question of compensation arises mainly with regard to secondary victims. Indirect purchasers belong to this second category. A further class of tertiary victims can finally be identified and refers to other parties that are injured as a result of an anti-competitive price, e.g. suppliers of the perpetrator of the anti-competitive act that suffer damage as a result of reduced sales. Compensation of these victims would probably fail because of

Under US antitrust law, indirect purchasers, for example traders that have purchased from retailers rather than from the manufacturer, cannot recover damages.⁹⁸⁹ The same applies to ultimate purchasers or consumers, notwithstanding the fact that the harm may have been passed on to them. US law clearly favours compensation only of direct purchasers and, indeed, it disallows the passing-on defence in this case.⁹⁹⁰ There is a powerful policy rationale behind this rule, that the direct purchaser is a more “efficient” plaintiff, ultimately preferable to indirect purchasers as “private attorney-general”. In general terms, the US rule seems to take into account certain prudential considerations such as the burden on the judicial system that would result if the private right of action were available in an unlimited way to remotely injured plaintiffs.⁹⁹¹ Denying indirect purchasers standing is also a direct consequence of the exclusion of the passing-on defence, since the defendant and perpetrator of the antitrust violation should not be vulnerable to multiple actions referring to the same acts, while at the same time it is not open to him to rely on the fact that the damage may have been passed-on. In other words, the US system bans the defensive use of the passing on principle by defendants, while at the same time banning its offensive use by indirect purchasers that base their claims exactly on the fact that the overcharge was passed on to them.

In the European context of damages claims, however, the constitutional status of the Treaty competition provisions and the fact that they form the basis of rights for individuals, means that the US theories should not be uncritically adopted. This “Treaty right” parameter of private EC antitrust enforcement means that compensation of victims of anti-competitive practices cannot be ignored as easily in Europe as in the US.⁹⁹² Therefore, the *a priori* exclusion of indirect purchasers and consumers from the ambit of the persons that can claim damages would not be compatible with Community law⁹⁹³ and, in addition, any allocative objectives of EC competition law would be undermined.⁹⁹⁴

difficulty to prove causation. On these categorisations see Calvani, “Competition Penalties and Damages in a Cartel Context: Criminalisation and the Case for Custodial Sentences”, Paper Presented in the Conference Organised by the Amsterdam Center for Law and Economics on Remedies and Sanctions in Competition Policy (Amsterdam, 17-18 February 2005), pp. 18-22.

⁹⁸⁹ Note, however, that state antitrust laws in the US may allow for indirect purchaser suits.

⁹⁹⁰ See the Supreme Court’s judgments in *Hanover Shoe, op.cit.*, and *Illinois Brick Co. v. Illinois*, 431 US 720 (1977). See further Rodger and MacCulloch, *supra* (1998), p. 602 *et seq.*

⁹⁹¹ See Davis, “Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury”, 70 Antitrust LJ 697 (2003).

⁹⁹² See Jones, *supra* (1999), ch. 16, who also considers that the ban of the passing-on defence should not be thought that it requires the simultaneous denial of standing to indirect purchasers.

⁹⁹³ See Temple Lang, *supra* (1999), p. 292; Brealey, *supra* (2002), p. 133.

⁹⁹⁴ See in this sense Toffoletto, *supra* (1996a), pp. 127-129. Compare the position taken by Norberg, *supra* (2003), p. 28, who stresses the importance of damages actions for the interests of the consumers.

At the same time, from a practical point of view, the US and the Community system of private antitrust enforcement are in a quite different stage of development. Civil claims in the former make up the vast majority of antitrust enforcement and private litigants with incentive offered by treble damages act as "private attorney-generals" thus increasing the deterrent effect of the law. While the compensatory function of such claims is not lost, it sometimes acquires a secondary place. On the other hand, in the Community system of competition law enforcement, civil claims - at least those where EC competition law is raised as a "sword" - have not been particularly numerous and damages awards are extremely rare. Prudential mechanisms therefore, aimed at curbing private actions, at least at the current stage of development of private antitrust enforcement in Europe, may not represent the optimal solution from a policy perspective.

Besides, the Court of Justice in *Courage* stressed that it is open to "any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".⁹⁹⁵ This was made clearer in *Manfredi*, where the Court of Justice rendered the debate about indirect purchasers obsolete, by stressing, while defining the constitutive conditions of the right in damages, that all affected individuals enjoy standing to sue, derived directly from the Treaty.⁹⁹⁶

The conferral by the Court of Justice of such a standing to direct and indirect purchasers alike would not lead to the unjust enrichment of direct purchasers, since, as Community law currently stands, the passing-on defence would still be in principle available to deal with problems posed by the defendant's unjustified enrichment.⁹⁹⁷ It is, nevertheless, true that some form of compromise can be attained so that multiplicity of actions and plaintiffs is avoided, thus safeguarding the efficiency of the whole system. The Green Paper seems conscious of this and stresses *de lege ferenda* the following:

"It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82, then it is submitted that such limitations should be acceptable under Community law. Therefore, it might be necessary to determine what rights must be facilitated to ensure an effective enforcement system rather than insisting on the

⁹⁹⁵ *Courage*, *op.cit.*, para. 26, emphasis added. AG Mischo had been even more specific in this point, stressing in para. 38 of his Opinion that "the individuals who can benefit from such protection are, of course, primarily third parties, that is to say *consumers* and competitors who are adversely affected by a prohibited agreement" (emphasis added).

⁹⁹⁶ See above.

⁹⁹⁷ Compare Option 21 of the Green Paper.

absolute protection of all private rights. For the protection of the rights of consumers, a specific small claims procedure or collective action might be an efficient form of redress given the very low level of individual damage suffered in many of the cases.⁹⁹⁸

It would not be the first time, of course, that the principle of effective judicial protection may be at odds with the principle of effectiveness of Community law and, indeed, commentators have long stressed that in such cases the instinctive approach of the Court of Justice would be to favour the latter over the former.⁹⁹⁹

Community law has, indeed, on occasions taken the policy decision to favour one particular plaintiff or defendant over another plaintiff or defendant. The Court of Justice in a recent case, interpreting the defective products liability Directive¹⁰⁰⁰ seemed aware of this problem.¹⁰⁰¹ It held there that the Directive had made a conscious choice to allocate liability to the producer of the defective products rather than to the suppliers. While acknowledging that the possibility of holding the supplier of a defective product liable in accordance with the provisions of the Directive would make it simpler for an injured person to bring proceedings, the Court felt that this would lead “to a multiplicity of actions, with the supplier seeking recourse in turn against his own supplier, back up the chain as far as the producer”. The Court defended the Community legislator’s choice that concentrated liability for defective products on the producer “after weighing up the parts played by the various economic operators involved in the production and distribution chain”, since, in the great majority of cases, the supplier does no more than sell the product in the State in which he bought it and only the producer is able to influence its quality. This shows that the allocation of liability can be quite a complex issue. It also shows that “weighing up the parts played by economic operators involved in the production and distribution chain” is better performed by the legislator than by courts.

In another recent case that concerned again the defective products liability Directive, the Court of Justice was asked to provide guidance on defendant-substitution, in particular, whether in case of an action brought against a company mistakenly considered to be the

⁹⁹⁸ Staff Working Paper, para. 180.

⁹⁹⁹ See, in particular, Prechal, “EC Requirements for an Effective Remedy”, in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997), p. 13; *idem*, *Directives in European Community Law* (Oxford, 2005), p. 144.

¹⁰⁰⁰ Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, OJ [1985] L 210/29.

¹⁰⁰¹ Case C-402/03, *Skov A/S v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen*, [2006] ECR I-199, paras. 28-29.

producer of a defective product, it is open to the national courts to view such an action as being brought against the real producer and to substitute the latter, as defendant to the action. The Court preferred to defer to the principle of procedural autonomy and to the national court's assessment but did specify that the national court, while examining the conditions governing such a substitution must, ensure that due regard is had to the personal scope of the Community legislation in question.¹⁰⁰² In the case of competition law-related actions, the courts would have to take into account the personal scope of Articles 81 and 82 EC, both with regard to plaintiffs and with regard to defendants.

From the above, it is obvious that, as Community law currently stands, it is open to any affected individual to bring a claim for damages on the basis of Articles 81 and 82 EC. That does not mean to say that the Community legislator could not make a policy decision and favour one particular class of plaintiffs over another, if that would be beneficial to the effectiveness of the whole system of private antitrust enforcement.¹⁰⁰³ In so doing, however, the legislator should bear in mind the personal scope of Articles 81 and 82 EC, which specifically mention consumers as the ultimate beneficiaries of antitrust through the notion of consumer welfare.¹⁰⁰⁴ Indeed, it is encouraging that the Commission's Green Paper itself has already made a clear policy choice in favour of consumers' standing. Even under the most restrictive of the options that are considered, consumers are always conferred standing to sue,¹⁰⁰⁵ and the Commission clearly sees the development of private antitrust enforcement partly through the consumers' perspective.¹⁰⁰⁶

vi. The Nature of Harm and Causation

In order for a damages claim to be successful, the existence of harm must first be established. Such harm must be certain, specific, proved, and quantifiable.¹⁰⁰⁷ An intriguing question in competition law is how far can certain harm attract liability on antitrust grounds. In other

¹⁰⁰² Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur MSD Ltd. and Sanofi Pasteur SA*, [2006] ECR I-1313, para. 39.

¹⁰⁰³ If the Community legislator were to pursue such an option, it would inevitably have to deal also with the passing-on defence for those limited cases where a specific class of indirect purchasers will have been denied standing. In these circumscribed cases, the passing-on defence will have to be disallowed as against the preferred direct purchasers, otherwise the perpetrator would be able to retain his illegal profits.

¹⁰⁰⁴ Of course, "consumer welfare" is certainly a different notion from "consumer protection" but the analysis of the two concepts lies outside the scope of this study.

¹⁰⁰⁵ Staff Working Paper, section VI.

¹⁰⁰⁶ See e.g. Wezenbeek, "Consumers and Competition Policy: The Commission's Perspective and the Example of Transport", 17 EBLR 73 (2006), p. 82.

¹⁰⁰⁷ See Van Gerven, *supra* (2005b), p. 9.

words, should every kind of harm of the victim of an anti-competitive practice qualify under this specific liability in damages?

In the United States the courts address this issue through the concept of “antitrust injury”. A private plaintiff must prove an injury caused by anti-competitive conduct that is of the type that the antitrust laws are designed to prevent. Such an antitrust injury does not exist, if the party is damaged only by increased or continued rather than by decreased competition (for example by aggressive non-predatory competition) or if the damage is the consequence of conduct, to which antitrust law is indifferent.¹⁰⁰⁸ However, the introduction of such a theory in EC competition law would not be appropriate and, indeed, the Commission’s Green Paper has preferred to ignore “antitrust injury”. This was a wise choice because this US theory would offer nothing at all to the European context. Firstly, because that theory was employed in the US in order to deal with conduct which under EC competition law would not amount to a violation of the rules in the first place. In other words, substantive law itself deals with the problem that the US doctrine was employed to address. A *Brunswick* kind of case in Europe would not have been dealt with as a competition law violation.¹⁰⁰⁹ Secondly, causation would block any remaining unmeritorious claims that could perhaps be based on a real violation of the competition rules yet resulted in no harm connected with that violation. Rather than importing another foreign notion, it is therefore preferable to deal with such claims on the basis of the standard conditions of liability.

Going back to the plaintiff’s burden to prove loss sustained as a result of the breach of the antitrust rules, one may distinguish between proving the extent of the damage itself and proving the causal link between the latter and the antitrust violation.

The damage sustained by a victim of anti-competitive behaviour may first correspond to the difference between the price paid as a result of a cartel or an abuse of a dominant position and the price that would otherwise be payable in the absence of the former (*damnum emergens*). Problems with the quantification of damages are more acute, when a firm is damaged in its commercial reputation or when it has lost potential clients, owing for example to a refusal to supply or to a collective boycott (*lucrum cessans*).¹⁰¹⁰

¹⁰⁰⁸ See the following Supreme Court cases: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977); *Blue Shield of Virginia v. McCready*, 457 US 465 (1982); *Associated General Contractors of California v. California State Council of Carpenters*, 459 US 519 (1983); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 US 104 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 US 328 (1990).

¹⁰⁰⁹ In *Brunswick*, the owners of three bowling alleys sued for damage allegedly suffered because the defendant had acquired several competing bowling centres that, in the absence of the acquisitions, would have failed. Thus, the harm referred in reality to the fact that competition was maintained and not eliminated.

¹⁰¹⁰ See also below.

An early interesting proposal¹⁰¹¹ that aimed at surpassing this problem was to follow the example of the law of industrial property or unfair competition of some legal systems (notably of France and Germany), where the loss is usually identified by reference to some criteria that have as one of their objectives to make it easier for the plaintiff to prove his loss while stripping the wrongdoer of any profit derived from the infringement. Similarly, restitutionary damages,¹⁰¹² which are known in some legal systems, can also be a useful remedy especially in cases where large groups of consumers claim damages from a producer. These damages are calculated on the basis of the profits derived by the violating entities rather than of the actual harm caused to the victims of the anti-competitive practices. Such a remedy would better correspond to the Community principle of effectiveness.¹⁰¹³

Indeed, the new Directive on the enforcement of intellectual property rights follows this path and provides for the possibility of damages to take into account “any unfair profits made by the infringer” or to be set as “as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question”.¹⁰¹⁴ This approach is also followed in the new s. 33(3) of the German Competition Act, which provides that the award of damages for violation of German or Community competition law may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the text employed, it seems that profit-skimming in this case does not refer to all the profits of the perpetrator but only to that “proportion” directly derived from and associated with the antitrust violation. Time will tell whether this new provision introduces a covert causal link, which complicates rather than simplifies matters.

Easing the burden of proof by means of Community legislation would certainly provide for an appropriate solution to all causation-associated problems. Thus, a drop in the plaintiff’s turnover in the relevant market and a simultaneous rise of the defendant’s turnover could be rebuttable evidence that the losses incurred were caused by the anti-competitive practice in

¹⁰¹¹ See Basedow, “Panel One Discussion: Substantive Remedies”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 34.

¹⁰¹² On restitutionary damages see Van Gerven, Lever and Larouche, *supra* (2000), p. 872.

¹⁰¹³ See Jones, “Panel One Discussion: Substantive Remedies”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 26.

¹⁰¹⁴ Directive 2004/48/EC, Art. 13(1). See further Huniar, “The Enforcement Directive: Its Effects on UK Law”, 28 EIPR 92 (2006), p. 98. It is true that these damages resemble a lot the notion of exemplary damages, although the deterrent-punitive element here recedes before the elements of “fairness”.

question.¹⁰¹⁵ Another idea is for the Commission to provide some guidance to national courts by publishing guidelines on damages that would define for example the core violations of EC antitrust rules and the types of loss incurred by third parties and consumers, and that would also include model-cases dealing with the causation problem.

Indeed, the latter problem is by far the most serious. It is worth-noting that in most of the cases where damages actions were brought before national courts the plaintiff has encountered grave problems in proving the causal link between damage and unlawful conduct. The most acute problem lies in determining profit losses (*lucrum cessans*), i.e. whether such losses are due to the anti-competitive practise of a competitor or to external conjectural economic factors.¹⁰¹⁶ Likewise, it is also difficult to prove causation in suits brought by consumers. This is so, because the causal link between the anti-competitive conduct and the damage suffered by the end-consumer is usually considered tenuous.

English law, employs notions of foreseeability and remoteness and provides that the plaintiff has the burden to prove that the defendant's unlawful conduct caused the harm and that it is the predominant cause of the plaintiff's loss.¹⁰¹⁷ Other national laws follow similar notions, depending on the legal tradition to which they belong. By way of example, modern German civil law is based more on the theory of imputation, referring to the protective scope of the law (*Schutzzweck*), than on the *causa adequata* theory, referring to the normal course of events. According to the former theory, in order to establish a causal link between the damage and the harmful event, one must refer to the purpose of the rule violated and all possible consequences that are not covered by the protective scope of that rule must be eliminated.¹⁰¹⁸

It is also worth mentioning that the protective scope theory in the determination of the causal link has not found favour in the state liability case law of the European Court of Justice, which follows the direct causal link theory.¹⁰¹⁹ According to this theory the harm must be regarded as a normal or natural consequence of the anti-competitive conduct, based on

¹⁰¹⁵ See Basedow, *supra* (2001), p. 464.

¹⁰¹⁶ See e.g. T. Com. Paris, 22-10-96, *Ecosystem*, *op.cit.*, where the plaintiff failed to prove his damage based on lost profits. See further Mail-Fouilleul, *supra* (2002), p. 609; Winckler, *supra* (2003), pp. 134-136.

¹⁰¹⁷ Compare *Arkin v. Borchard Lines Ltd. et al. (IV)* (QB (Com.Ct.)), [2003] EWHC 687, a case concerning liner conferences and the alleged violation of Art. 81 and 82 EC, where the court decided that the plaintiff's own irrational pricing policy was the predominant cause of his business failure. This case raises, however, some concerns about the effectiveness of the right in damages in Community competition cases, since the UK court found that the conduct of a plaintiff that continues trading wrongfully, although he knows that his business is evaporating, may break the chain of causation and thus exclude the defendant's liability.

¹⁰¹⁸ See Mestmäcker, *supra* (2001), p. 235, with references to case law.

¹⁰¹⁹ See e.g. cases C-178/94 to C-179/94 and C-188/94 to C-190/94, *Dillenkofer et al. v. Germany*, [1996] ECR I-4845, para. 21. See further Stathopoulos, *supra* (2003), p. 532; Van Gerven, *supra* (2005b), p. 8.

common experience. Whether these notions are so different as to affect the effectiveness of Community law, remains unclear. The Commission in its Green Paper appears to take a less interventionist approach and considers that all these various national notions of causation are equivalent.¹⁰²⁰ A similar approach has been taken by the European Court of Justice in *Manfredi*, which enumerated the causal link as one of the constitutive conditions of individual civil liability but deferred to the national laws for the more detailed or “executive” conditions of that causal link.¹⁰²¹

vii. Nature and Measure of Damages

In order for a private action for damages to lead to effective antitrust enforcement, the measure of damages must be of such a proportion that it can have a deterrent effect for the perpetrator of the anti-competitive acts and that it can represent a credible remedy for all future victims. Thus, damages must cover not only the direct damage, but also any indirect damage suffered in such a way, that the damages award contributes to deterrence.¹⁰²²

In this respect, it is firstly of fundamental importance that the victim gets fully compensated. This may not be evident, because many EU Member States legal systems do not allow for tort claims for pure economic loss. Yet, this kind of loss is very likely to result from an anti-competitive action. It is true that, depending on the legal system, damages may sometimes be asked according to the law of contract (contractual liability), if between the perpetrator of the anti-competitive act and the victim exists a contractual relationship.¹⁰²³ In such cases and unlike the case of tortious liability, in principle damages would cover also pure economic loss.¹⁰²⁴ However, the exclusion of the reparation of pure economic loss, be it under tort or under contract, is certainly not compatible with the Community law basis of the right in damages.

¹⁰²⁰ Staff Working Paper, para. 273 *et seq.*

¹⁰²¹ In other words, the Court in *Manfredi* stresses that, as a matter of Community law, causal link is one of the conditions of civil liability for antitrust-related injuries (*op.cit.*, para. 61), while at the same time accepting that it is for the domestic legal system of each Member State to prescribe “the detailed rules governing the exercise of that right, including those on the application of the concept of ‘causal relationship’”, provided that the principles of equivalence and effectiveness are observed” (*op.cit.*, para. 64, emphasis added).

¹⁰²² See Canivet, *supra* (1997), p. 26.

¹⁰²³ This, however, is only possible in those legal systems, typically in the continental ones, where contractual liability is wide enough to encompass such claims. Common law, on the other hand, treats such claims under tort.

¹⁰²⁴ This is the case for example under Austrian (see Günther, *supra* (2001), p. 319) and Finnish law (see Erämetsä, *supra* (2001), p. 222, fn. 257).

As it is rightly pointed out, "if tortious liability for breaches of Community law is to have any meaning, such losses must be eligible for compensation".¹⁰²⁵ Indeed, the Court of Justice in *Brasserie du Pêcheur/Factortame III* has stressed that "total exclusion of loss of profit as a head for damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible".¹⁰²⁶ The Court of Justice placed particular emphasis on these principles again in *Manfredi* and, although it was not specifically requested by the referring courts to pronounce itself on this particular issue, it held:

"It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest ... Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible ... As to the payment of interest, ... an award made in accordance with the applicable national rules constitutes an essential component of compensation."¹⁰²⁷

A further issue of some complexity is quantification of damages. The Commission in its Green Paper has presented certain econometric models that aim in one form or the other at bringing the plaintiff in the situation he would have been "but for" the illegal conduct (the counterfactual). In this context, the current situation of the plaintiff is taken into account and the difference between the two covers actual losses and lost profits.¹⁰²⁸ Whether such models, however, can be helpful, is unclear. In *Arkin*,¹⁰²⁹ the court was provided, with detailed expert econometric evidence as to the position the plaintiff would have been in but for the anti-competitive conduct of the defendants, but apparently it was not enthusiastic about that and adopted what can be called a "common sense approach". This will most likely be the

¹⁰²⁵ See Van Gerven, Lever and Larouche, *supra* (2000), p. 893.

¹⁰²⁶ *Brasserie du Pêcheur/Factortame III*, *op.cit.*, para. 87.

¹⁰²⁷ *Manfredi*, *op.cit.*, paras. 95-97. On the requirement to include compensatory interest in the damages award, see also Van Gerven, *supra* (2005b), p. 10, and paras. 122-124 of the Commission's Staff Working Paper.

¹⁰²⁸ Staff Working Paper, para. 125 *et seq.*

¹⁰²⁹ Cited *supra*.

approach of other national courts, and indeed, it is preferable for the Commission not to proceed in an eventual legislative proposal to such complex econometric models, at least in the short and mid-term, but rather wait for the national judges to acquire experience and acquaintance with this area. An over-optimistic set of guidelines with complex models might estrange national judges and give rise to defensive attitudes.

With regard, finally, to the nature of damages, the absence of punitive damages in Europe means that the primary function of civil claims remains the compensatory one, and only indirectly does deterrence come forward. While awards of purely compensatory damages certainly also create a psychological impact,¹⁰³⁰ it is also true that the sole compensatory character of damages does not constitute a sufficient incentive for the victim of the breach to bring a private action and a sufficient deterrent for the tortfeasor not to engage in anti-competitive practices.¹⁰³¹ As it is rightly pointed out, this deficit has a negative impact upon compliance incentives and ultimately upon the efficiency of EC competition law enforcement itself.¹⁰³² Thus, while the introduction in Europe of all the incentives used by US law in private antitrust enforcement, such as pre-trial discovery, class actions, and contingency fees,¹⁰³³ would neither be possible in the short run,¹⁰³⁴ nor indeed desirable (especially with regard to class actions and contingency fees), a considerable number of commentators increasingly views the possibility to recover punitive damages, at least in cases of egregious violations of the competition rules, in particular in cartel cases, as the only alternative that would energise private antitrust enforcement in Europe and would really transform the private litigant to a "private attorney-general".¹⁰³⁵

¹⁰³⁰ In the words of a commentator "the single most useful event might be for some bold Community plaintiff to win a significant damages judgment which really 'bangs the bell'" (see Jones, *supra* (2003), p. 106). This view is also expressed by Faull, "Future Competition Law - Working Paper II", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998), p. 508.

¹⁰³¹ Staff Working Paper, para. 112.

¹⁰³² See Norberg, *supra* (2003), p. 28.

¹⁰³³ Other incentives for more private enforcement include one-way fee shifting, according to which if plaintiff prevails, defendant must pay the plaintiff's costs, but if defendant prevails, plaintiff is not required to pay the defendant's costs, and joint and several liability of each defendant for the whole amount of trebled damages combined with the "no contribution rule", according to which a defendant who has paid all damages cannot seek indemnity by other co-defendants. See further Venit, *supra* (2003), p. 572.

¹⁰³⁴ See Norberg, *supra* (2003), p. 29.

¹⁰³⁵ See Basedow, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 35; Siragusa, "Panel Discussion: Modernization of EC Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000), p. 326. Compare also the public statements of Commissioner Kroes on 17 October 2005 foreshadowing the Green Paper on private enforcement. See, however, Jones, *supra* (2003), pp. 102-105, according to whom, while treble damages are a powerful incentive for private enforcement in US law, their non-availability in European law might have been overstated by European lawyers. According to this author, whose proposals have proved very influential in EC competition circles, the European legal systems provide for a very

Punitive damages, however, have traditionally been seen unfavourably in European jurisdictions,¹⁰³⁶ while the sole compensatory function of civil damages has been considered a general principle permeating private law as a whole. According to this line of thinking, the punitive or penal character of damages offends against the principle of proportionality, leads to the enrichment of the victim, and encroaches upon the value of human dignity of every person, *in casu* of the debtor.¹⁰³⁷ Indeed, in the past, foreign judgments or arbitral awards that have awarded punitive damages in contractual or non-contractual liability cases have been denied enforcement in Europe on grounds of violation of public policy, although there are many signs that this negative approach might be slowly changing.¹⁰³⁸ Surprisingly, the utterly negative European predisposition vis-à-vis punitive damages is echoed in the recent Commission "Rome II" regulation proposal on the law applicable to non-contractual obligations,¹⁰³⁹ which includes an express provision in Article 24 on punitive damages awards, considered to be against the "Community public policy".¹⁰⁴⁰

Notwithstanding this *faux pas*, it has been persuasively argued that there is already Community legislation, the late payments Directive,¹⁰⁴¹ which establishes a legal interest rate of a punitive character, in order to deter late payment.¹⁰⁴² Punitive or exemplary damages for

useful alternative that US law lacks: prejudgment interest. Prejudgment interest could in many cases reach the level of trebled damages.

¹⁰³⁶ See e.g. Van Caenegem, *supra* (2004), p. 637, who refers to the US "monstrous" damage awards in antitrust cases.

¹⁰³⁷ See e.g. Stamatis, "Recognition of a Foreign Judgment Awarding Punitive Damages", 51 *Nomiko Vima* 1553 (2003) [in Greek], pp. 1554-1557.

¹⁰³⁸ In Greece, for example, the Supreme Court (*Areios Pagos*) has lately accepted, as a principle, that foreign punitive damages awards are not *per se* incompatible with public policy (*ordre public international*), but it has invited lower courts to check on an *ad hoc* basis the disproportionate character of such awards, which under certain circumstances may be unacceptable (*Areios Pagos* n° 17/1999, 6 *Koinodikion* 69 (2000), 48 *Nomiko Vima* 461 (2000); *Areios Pagos* n° 1260/2002, 51 *Nomiko Vima* 1020 (2003)). While this jurisprudence is certainly the sign of a less dismissive attitude towards punitive damages as such, the minimum proportionality control amounts to a *révision au fond*, prohibited under private international law. See further Panagopoulos, "Punitive Damages and Greek Public Policy (or towards a Reevaluation of the Objectives of Civil Liability)", 2000(2) *Kritiki Epitheorisi* 195 [in Greek], p. 207 *et seq.* On the more restrictive attitude of German courts see Zekoll and Rahlf, *supra* (1999), p. 387 *et seq.*; P. Müller, *Punitive Damages und deutsches Schadensersatzrecht* (Berlin/New York, 2000), p. 17 *et seq.*; Wurmnest, "Recognition and Enforcement of US Money Judgments in Germany", 23 *Berkeley JInt'l L* 175 (2005), pp. 196-197.

¹⁰³⁹ *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II")*, COM(2003) 427 final.

¹⁰⁴⁰ According to the Explanatory Memorandum to the draft regulation, "Article 24 is the practical application of the Community public policy exception provided for by the third indent of Article 23(1) in the form of a special rule ... The effect of Article 24 is accordingly that application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded will be contrary to Community public policy." For critical comments against this unfortunate text see Stone, "The Rome II Proposal on the Law Applicable to Non-Contractual Obligations", 4 *ELF* 213 (2004), p. 222.

¹⁰⁴¹ Directive 2000/35/EC, OJ [2000] L 200/35.

¹⁰⁴² According to Art. 3(1)(d) of the Directive, the debtor is obliged to pay as interest the sum of the interest rate applied by the European Central Bank - or of the national central bank in case of Member States not

competition law violations are also available under certain national laws¹⁰⁴³ and this means that they must also be available for violations of EC competition law, further to the principle of equivalence.¹⁰⁴⁴ It is noteworthy that the Court of Justice in *Manfredi* did not exclude the possibility of awarding punitive damages. The Court clearly saw a possibility for the Community legislator to adopt rules on such damages and did not follow the approach of the “Rome II” regulation proposal to consider such awards contrary to Community public policy. Indeed, the Court stressed that

“as to the award of damages and the possibility of an award of punitive damages, *in the absence of Community rules governing the matter*, it is for the domestic system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed”.¹⁰⁴⁵

If the Court had shared the view of the drafters of the “Rome II” regulation proposal that such damages awards are contrary to Community public policy, it would have said so expressly and, in any event, it would have certainly avoided to use the expression “in the absence of Community rules governing the matter”, which implies that Community law can indeed proceed to the introduction of such awards without running the risk of legislating against a fundamental principle of Community public policy.¹⁰⁴⁶

At any rate, if punitive damages were to be introduced by Community legislation, this would render obsolete the discussions as to their compatibility not only with Community public policy but also with the public policy notions of the Member States, and the principle of supremacy of Community law would fully apply.¹⁰⁴⁷ It is interesting that in the 2001 Florence Workshop on private enforcement former Advocate General van Gerven had drawn a draft regulation that contained a rule on exemplary damages, according to which damages recoverable could exceed the payable compensation to the harmed person, though for not more than half of it.¹⁰⁴⁸ The Green Paper follows this course and includes in one of its options the possibility to award double damages “in case of the most serious antitrust infringements,

participating in the EMU - to its most recent main refinancing operation plus at least seven percentage points, unless otherwise specified in the contract. See Basedow, “Panel One Discussion: Substantive Remedies”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 35.

¹⁰⁴³ See s. 14(5)(b) of the Irish Competition Act.

¹⁰⁴⁴ *Brasserie du Pêcheur/Factortame III*, *op.cit.*, paras. 89-90; *Manfredi*, *op.cit.*, para. 93.

¹⁰⁴⁵ *Manfredi*, *op.cit.*, para. 92, emphasis added.

¹⁰⁴⁶ It is now clear after *Manfredi* that the relevant text of the regulation proposal and, in particular, its Explanatory Memorandum will have to be amended accordingly.

¹⁰⁴⁷ Such Community legislation may have as its indirect consequence a shift in the perception of public policy in the EU Member States with regard to foreign judicial and arbitral decisions that award punitive damages, since the latter will no longer offend against the fundamental values of these legal systems.

¹⁰⁴⁸ See Van Gerven, *supra* (2003a), pp. 90-93.

i.e. horizontal cartels”.¹⁰⁴⁹ It is interesting that the Commission, perhaps being prudent in an over-sensitive area does not view such damages awards in their punitive nature but rather as “a clear incentive for claimants to bring antitrust damages cases”. While, indeed, the introduction of double damages will be a powerful incentive for plaintiffs, it would make better sense if the Commission abandoned its timidity and declare in open terms the punitive nature of these awards. Such an approach would enhance the deterrent effect and the effectiveness of this instrument. If the Community judges in *Manfredi* did not shy away from addressing this question, the Commission should not feel constrained either.¹⁰⁵⁰

c. Injunctions

Apart from damages, other civil remedies may prove equally efficient from a plaintiff's perspective in an EC competition private action. Injunctions, i.e. court-ordered measures requiring the defendant to cease any anti-competitive conduct and to desist from such conduct in the future, are the most important, especially when an anti-competitive behaviour would be better fought with an injunction, rather than with an eventual damages award.¹⁰⁵¹ An injunction can contain detailed negative and positive orders aiming at changing the competition law infringer's conduct in the market generally and vis-à-vis the victim of the anti-competitive conduct specifically.¹⁰⁵² Although the recent Commission Green Paper regrettably does not deal with all remedies pertaining to private enforcement, including injunctions, but is limited to damages, there is no doubt that injunctions should also be seen as part of private antitrust enforcement.¹⁰⁵³

¹⁰⁴⁹ Option 16 of the Green Paper. The specific text seems to refer to horizontal cartels in an indicative manner. It is unclear, however, whether the Commission considers the possibility of introducing such punitive damages in other serious infringements of competition law, e.g. in serious abuses of dominant position. Nevertheless, public statements by Commission officials seem to indicate that double damages would be introduced, if at all, only for horizontal cartels. Such an option would make better sense in terms of legal certainty and predictability, since it is not always easy to categorise an abuse of dominance as “serious”, while horizontal cartels are clearly identifiable as such.

¹⁰⁵⁰ There may be strategic concerns behind this “timidity” of the Commission, having to do with the legislative process. In other words, presenting double damages as an “incentive” rather than as “punitive”, may enhance a potential Community measure's chances in the Council and the Member States and may indeed even affect the choice of the appropriate legal basis (see above).

¹⁰⁵¹ It should be stressed that s. 4 of the US *Clayton Act*, apart from damages, provides also for injunctive relief to any person injured by a violation of the antitrust laws. However, the common law principle that an injunction cannot be obtained if the plaintiff can be fully compensated with damages, applies to that case, too.

¹⁰⁵² See Ritter, Braun and Rawlinson, *supra* (2000), p. 927, and the cases cited in fn. 1054. According to those authors, injunctions represent the most common civil remedy in national court proceedings for violation of competition law.

¹⁰⁵³ Indeed, the Green Paper sees interim and permanent injunctive relief as one of the different forms that private enforcement of EC competition rules can take (Staff Working Paper, paras. 16-17).

An injunction may prove a particularly valuable remedy in Article 82 EC cases and in cases involving intellectual property rights.¹⁰⁵⁴ Usually the victim of an abuse of dominant position seeks to enjoin the dominant undertaking to cease the abusive behaviour, through a positive or negative act. A positive act can be the continuation of contractual relationships (in case of a refusal to supply) or even the conclusion of a new contract by the dominant undertaking with the victim of the abuse (*Kontrahierungszwang*).

Most legal systems recognise the remedy of injunction in competition law cases,¹⁰⁵⁵ but inconsistencies do exist. Thus, under English law an injunction will only be granted, if damages are unlikely to be an adequate remedy.¹⁰⁵⁶ This principle, however, seems to be at variance with Community law, if applied as absolute bar to the right to an injunction. Continental legal systems, on their part, make injunctions available irrespective of the availability of damages.¹⁰⁵⁷

The position in German law has been until recently that a duty to contract (*Kontrahierungszwang*) and a claim to be supplied (*Belieferungsanspruch*) exists only in abuse of dominance cases, since these remedies are considered incompatible with the

¹⁰⁵⁴ E.g. in a Dutch case a patent holder was ordered against payment of royalties to refrain from measures which could impede the use of its patent by a third party (Court of Appeal of Den Bosch, 18-1-77, *Heidemij v. Bronbemaling*, (1977) *Nederlandse Jurisprudentie* 463; [1978] 1 CMLR 36, cited by Sevinga, *supra* (1994), pp. 177-178, 200).

¹⁰⁵⁵ A direct national legal basis for injunction claims is provided for by s. 14(5)(a) of the 2002 Irish Competition Act and s. 33(1)(2) of the German Competition Act, as recently amended. Other legal systems arrive at the same result by employing non-competition law-specific provisions in their civil laws.

¹⁰⁵⁶ *American Cyanamid Co. v. Ethicon* (HL), [1975] AC 396. In England it seems that no permanent injunction has ever been ordered by the courts, possibly as a result of an inclination of the litigants to settle, but there is no reason to doubt that English courts would deal with a claim for a permanent injunction differently than with a claim for an interlocutory injunction. See Kerse, *supra* (1998), p. 436; Lane, *supra* (2000), p. 203; Tritton, Davis, Edenborough, Graham, Malynicz and Roughton, *supra* (2002), p. 939. On interlocutory injunctions in English courts, see below.

¹⁰⁵⁷ Under German and Greek law, the violation or the risk of violation of a specific right means that the court can make a cease and desist order, notwithstanding the possibility of a damages claim. In Greece, where there is no specific provision in the Competition Act on injunctions, unlike the new s. 33(1)(2) of the German Competition Act, an injunction for specific performance (including the conclusion of a new contract) can have the form of *in natura* compensation and may find its legal basis in Arts. 914 and 297, or alternatively in Arts. 914, 281 and 288 of the Greek Civil Code. On German law, see Braun, *supra* (1996), pp. 431, 580, with references to case law, and on Greek law, see Koutsoukis, *supra* (1993), p. 343; Iliopoulos, *supra* (2000), pp. 251-252, 289; Liakopoulos, *supra* (2000), p. 499. In France it is accepted that injunctions are possible (see Boulanger, *supra* (1997), p. 196), even injunctions ordering the conclusion of a contractual relationship (see A. Tercinet, *Droit européen de la concurrence, Opportunités et menaces* (Paris, 2000), p. 121). See also the *sui generis* provision of Art. L442-6(3)(b) *Code de commerce*, which gives *locus standi* to request an injunction also to the public prosecutor and to the Minister of the Economy. In Belgium an injunction (*action en cessation*) can be based upon unfair competition law (Art. 54 of the 1971 Act on Commercial Practices); see Noirfalisse, *supra* (1994), p. 63, with references to case law. The same is accepted in Austrian law, where an anti-competitive conduct is also considered to fall under s. 1 of the Unfair Competition Act (UWG) (see Maitz-Strassnig, *supra* (1999), p. 34; Günther, *supra* (2001), p. 320), and in Italian law, where parties can rely on Art. 2599 of the Civil Code (see Ligustro, *supra* (1992), pp. 219-221).

protective scope (*Schutzzweck*) of Article 81 EC.¹⁰⁵⁸ German courts seem to feel entitled to detect the *Schutzzweck* of that provision, in excluding the possibility of injunctions ordering positive measures, although such an authoritative and final interpretation is clearly reserved only to the Community Courts.¹⁰⁵⁹ It is unclear whether the new text of s. 33(1) GWB, which makes injunctions available also to Article 81 EC cases, is a departure from that approach.

It is interesting that this question has also arisen in the context of administrative enforcement by the Commission. The Court of First Instance was confronted with this question in *Automec II*.¹⁰⁶⁰ There, the complainant had been refused an injunction by the Commission requiring BMW to supply it with vehicles. Freedom of contract was according to the Court the basic rule, therefore the Commission could not order a party to enter into a contractual relationship “where as a general rule the Commission has suitable means at its disposal for compelling an enterprise to end an infringement”.¹⁰⁶¹ In the Commission’s view such purely positive measures may be more justifiable in Article 82 EC cases.¹⁰⁶²

These Community pronouncements, however, are not conclusive for the proposition that a duty to contract can never be a remedy in Article 81 EC private enforcement cases.¹⁰⁶³ First, the Court of First Instance and the Commission qualify their position by stating that such measures are excluded “in principle”, thus leaving the possibility of exceptions. Second, they both refer to Community administrative and not to national civil proceedings. Indeed, the

¹⁰⁵⁸ See the judgment of the Federal Supreme Court in the *Depotkosmetik* case, BGH, 12-5-98, *City Parfümerie Jürgen Rathjen GmbH v. Deutsche Lancôme GmbH*, 53 BB (1998) 2332. See further on this issue Birk, “Belieferungsansprüche bei Verstoß gegen Art. 81 EG?”, 11 EWS (2000) 485, p. 486 *et seq.*; Roth, “Europäisches Kartellrecht - Terra Incognita?”, 53 NJW (2000) 1313, p. 1314. In Greece, too, the equivalent national provision of Art. 81 EC, Art. 1 L. 703/1977, is thought not to provide for a right to be supplied or for a duty to contract, unlike the provision of Art. 2 L. 703/1977, equivalent to Art. 82 EC. See e.g. Monomeles Protodikeio Athens n° 18743/1992, in: D. Koutsoukis and D. Tzouganatos, *The Application of L. 703/1977 ‘on the Protection of Free Competition’*, Vol. III, 1990-1995 (Athens, 1996) [in Greek], p. 323 *et seq.*

¹⁰⁵⁹ See the critical comments of Von Winterfeld, “Zum Schutzzweck des Art. 81 EG-Vertrag und zu den Rechtsfolgen eines Verstoßes nach nationalem deutschen Recht”, in: Bradner, Hagen & Stürmer (Eds.), *Festschrift für Karlmann Geiß zum 65. Geburtstag* (Köln/Berlin/Bonn/München, 2000), p. 669, as to the national court’s usurpation of the ECJ’s exclusive competence to interpret the protective scope of Treaty rules.

¹⁰⁶⁰ An argument against the possibility of an injunction ordering the continuation of a contractual agreement under Art. 81 EC is also sometimes derived from the ECJ judgment in cases 228/82 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v. Commission*, [1984] ECR 1129, where the Court annulled the Commission’s interim measures decision (Commission Decision 82/628/EEC of 18 August 1982 (*Distribution system of Ford Werke AG - interim measure*), OJ [1982] L 256/20) ordering Ford to supply its distributors in Germany right-hand drive cars. However, this happened as a result of procedural irregularities and not because such a positive measure cannot be ordered in principle in Art. 81 EC cases. See further on this case Idot, “Les mesures provisoires en droit de la concurrence : Un nouvel exemple de symbiose entre le droit français et le droit communautaire de la concurrence”, 29 RTDE 581 (1993), p. 595.

¹⁰⁶¹ *Automec II*, *op.cit.*, para. 51. The other means are presumably the prohibition of an agreement, the withdrawal of the benefit of an individual or block exemption and fines and/or periodic penalty payments.

¹⁰⁶² See the Commission’s arguments in *Automec II*, *op.cit.*, para. 43.

¹⁰⁶³ See the critical comments of Idot, “La situation des victimes de pratiques anticoncurrentielles après les arrêts *Asia Motor* et *Automec II*”, (1992-12) *Europe* 1, pp. 3-4. For a more general outlook of the injunctive remedies granted by the Commission, see Mail-Fouilleul, *supra* (2002), pp. 85-100.

Court of First Instance specifies that it is incumbent upon the national courts, where appropriate, in accordance with the rules of national law, to order one trader to enter into a contract with another.¹⁰⁶⁴ A duty to contract, therefore, as a civil remedy in Article 81 EC cases should not be excluded. Indeed, national courts in many jurisdictions have been accustomed to such remedies, which may contradict the 19th century concept of freedom of contract, but have been readily available in the last century.

An injunction may be an efficient remedy not only in its permanent, but also in its preliminary form. Such preliminary injunctions can be attained by national courts,¹⁰⁶⁵ notwithstanding any parallel competence of the Commission¹⁰⁶⁶ or national competition authorities to take similar provisional measures. The former are of civil nature and are aimed at the protection of private interests by provisionally securing civil claims, such as a claim for damages in case of alleged anticompetitive harm,¹⁰⁶⁷ whereas the latter are of administrative nature and are basically aimed at safeguarding the public interest - at least as far as the Commission is concerned¹⁰⁶⁸ - at avoiding the continuation of the illegal practice, and at restoring the *status quo ante*. However, it is true that in some cases this distinction becomes less apparent with both kinds of interim measures leading to the same result.

Interim measures have been ordered on many occasions by national courts in EC competition law cases.¹⁰⁶⁹ In some jurisdictions the judge enjoys wide powers and may order *ad hoc*

¹⁰⁶⁴ *Automec II*, *op.cit.*, para. 50.

¹⁰⁶⁵ See Canivet, "Aspects stratégiques du procès en droit de la concurrence", in: *Les aspects contemporains du droit de la distribution et de la concurrence, Actes du colloque de l'Université de Toulouse I (24 et 25 mars 1995) et conférences de doctorat* (Paris, 1996), p. 104.

¹⁰⁶⁶ In Reg. 17/1962 there had been no explicit reference to the possibility of the Commission to take interim measures. This gap was filled by the ECJ in case 792/79, *Camera Care Ltd. v. Commission*, [1980] ECR 119, para. 19. The Commission could adopt interim or interlocutory measures in urgent cases, in order to avoid a situation likely to cause serious and irreparable damage to a complaining party or harm to the public interest. However, Art. 8(1) Reg. 1/2003 excludes the protection of private interest as such from the scope of Commission-ordered interim measures (see reference to "serious and irreparable damage to competition"). Interim measures with the sole aim to protect the private interest of a complainant or plaintiff can only be adopted either by NCAs, if their national law so provides, or by national courts. Of course, it is very likely for an anti-competitive practice that damages a specific person to harm the public interest in general. For a critical comment of this restriction of the conditions for the granting of provisional measures by the Commission see Idot, *supra* (2004c), pp. 125-126. Compare also the Press Release of the Greek Competition Committee of 24 October 2005 on the availability of interim measures. There, the Greek authority makes clear that it will follow the EC approach, referring to Art. 8(1) Reg. 1/2003, and will no longer entertain interim measures applications by private parties.

¹⁰⁶⁷ See e.g. Koutsoukis, "The New Institution of Interlocutory Relief in Competition Law Cases (L. 703/77)", 48 *Epitheorisi Emporikou Dikaion* 153 (1997) [in Greek], p. 161, on the discussion of the relationship between interim measures in the Greek Competition Act - that can be taken only by the Competition Committee - and ordinary interim measures of civil procedural law - that are ordered by civil courts.

¹⁰⁶⁸ On the new text of Art. 8(1) Reg. 1/2003, see above.

¹⁰⁶⁹ For a Dutch preliminary injunction to resume supply in an Art. 82 EC case, see Pres. Rechtbank Amsterdam, 5-4-79, *Van Gelderen Import BV v. Impressum Nederland BV*, (1981) NJ 129, discussed by Visser 't Hooft, "Japanese Law and the Unilateral Termination of Distribution Agreements: A Comparison with Dutch Law", in: Grosheide & Boele-Woelki (Eds.), *Europees Privaatrecht 1995* (Lelystad, 1995), p. 194. See also the

measures, such as an announcement in the press or to the victims of an anti-competitive practice regarding the illegality of that practice.¹⁰⁷⁰ In some legal systems it is even possible for a court to award “provisional damages”, if it appears certain, already at a preliminary stage, that an unlawful act has taken place that has causally led to harm being inflicted upon another.¹⁰⁷¹

Problems may be encountered in legal systems, where courts are not willing to enter into the assessment of very complicated factual circumstances at such an early stage of the trial, without entering into the substance of the case.¹⁰⁷² However, the task of a national court may be far easier, in case the illegality of a certain practice has already been established by the Commission or by the Court of Justice. In such circumstances, there is no doubt that at least a *prima facie* case exists as to the anti-competitive nature of the practice in question.¹⁰⁷³

Irrespective of the legal bases for permanent and interim injunctions provided by national laws, Community law has now sufficiently progressed to provide itself such a remedy. Thus, an injunction on grounds of violation of Community competition law is based on Community law itself, exactly as the right in damages derives from the Treaty. The Court of Justice has in the past dealt with the case of preliminary injunctions vis-à-vis the Member States in *Factortame I*,¹⁰⁷⁴ but this principle is considered to apply to permanent injunctive relief, too.¹⁰⁷⁵

Irish case *Patrick Dunlea & Sons v. Nissan (Ireland) Ltd.*, cited by Maher, *supra* (1999), p. 293, where the defendant had terminated its distribution agreement with the applicant, who had started to sell imported second hand cars of the same brand. The latter alleged that the notice for the termination of the agreement was too short and that the conduct of the defendant amounted to an abuse of dominant position. The Irish High Court granted the injunction as requested. For English cases see *Cutsforth v. Mansfield Inns* (QB), [1986] AllER 577; *Holleran v. Daniel Thwaites plc.* (Ch.), [1989] 2 CMLR 917. See also Shaw, “United Kingdom”, in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. 1, *United Kingdom and Italy* (Baden-Baden, 1992), p. 85.

¹⁰⁷⁰ For a Dutch case, see e.g. Pres. Rechtbank Utrecht, 11-2-92, *FNK/SCK*, cited by Sevinga, *supra* (1994), pp. 200-201.

¹⁰⁷¹ See e.g. Braakman, *supra* (2000), p. 171.

¹⁰⁷² This is the case for example in Denmark (see Fejø, “Denmark”, in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria* (Baden-Baden, 2001), p. 63), in France (see Boulanger, *supra* (1997), p. 226 *et seq.*), and in Holland (see Sevinga, *supra* (1994), p. 153). On some weaknesses of such provisional measures of civil nature, in particular with regard to specific areas of competition law, such as to essential facilities, see Hatzopoulos, *supra* (2002), pp. 170-172.

¹⁰⁷³ See Boulanger, *supra* (1997), p. 228, referring to the requirement in French law of a *trouble manifestement illicite*. It appears that the *Cour de Cassation* has adopted a less restrictive interpretation of the above criterion with regard to Community law (see Cass.com., 10-7-89, *Bodson v. PFRL*, Bull.Civ., 1989, IV, n° 216).

¹⁰⁷⁴ It should not be missed that the *juge-rapporteur* in *Factortame I* was Judge Kakouris, who has argued against the existence of a principle of national procedural autonomy. See further Diez de Velasco, “L’acquis communautaire: La contribution de Monsieur le Juge Kakouris à son développement”, in: *Problèmes d’interprétation à la mémoire de Constantinos N. Kakouris* (Athènes/Komotini/Bruxelles, 2004), pp. 96-97.

¹⁰⁷⁵ See in this sense Beneyto, *supra* (1994), p. 312. Compare, in that context, the existing Community legislation on injunctive relief in consumer protection (Directive 98/27/EC). For a critical overview of that Directive see Van Gerven, *supra* (2003b), p. 13.

Thus, returning to the scheme of former Advocate General Van Gerven on the existence of Community law remedies, injunctive relief is one of the specific remedies that are available to individuals for violations of Community law.¹⁰⁷⁶ It is indeed expected that the Community Courts' jurisprudence will further build upon the *Courage* principles and recognise the Community law basis not only for the damages claim but also for injunctive relief claims as between private individuals, as expounded by the Former Advocate General Van Gerven.¹⁰⁷⁷ Advocate General Jacobs in a recent Opinion follows this course. In *AOK Bundesverband* the Advocate General stressed that "both damages and injunctive relief would as a matter of Community law be available to anyone suffering loss as a consequence of [anticompetitive] conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness."¹⁰⁷⁸ According to the Advocate General, the *Courage* principle would equally apply to injunctive relief. This is now also accepted by the Commission Green Paper, which stresses:

"Whereas nullity as a sanction for infringements of Article 81 EC has been explicitly foreseen by the EC Treaty itself (Article 81(2) EC), damages actions or actions for injunctive relief can be deduced from Article 10 EC. In addition, according to the case-law of the Community Courts, the full effectiveness of directly applicable Community law requires national courts to have jurisdiction to grant interim relief."¹⁰⁷⁹

d. Restitution and Declaratory Actions

Other civil remedies for the purposes of private antitrust enforcement include restitution and declaratory actions. Restitution may be a convenient remedy for the victim of the anti-competitive conduct, because, rather than proving the harm and the causal link between harm and prohibited conduct, which can be too onerous a task for a private litigant, it is enough to prove that a company has become richer in an unjustified manner to the detriment of the

¹⁰⁷⁶ See above.

¹⁰⁷⁷ See Van Gerven, *supra* (2003a), pp. 63-66.

¹⁰⁷⁸ Para. 104 of AG's Opinion in cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband et al. v. Ichthyol-Gesellschaft Cordes et al.*, [2004] ECR I-2493.

¹⁰⁷⁹ Staff Working Paper, para. 17, with references to AG Jacobs's Opinion in *AOK Bundesverband*. See also in this direction Stuyck, "The Specificity of Consumer Law in the Process of Europeanization of European Contract Law", Paper Presented at the EUI Conference on the Europeanisation of Private Law (Florence, 24-25 October 2003), p. 2.

plaintiff. Most legal systems provide for such a remedy,¹⁰⁸⁰ although relevant court decisions are quite rare.¹⁰⁸¹ In competition law, this specific remedy takes the form of a claim aimed at the restitution of a benefit that is passed on to and enjoyed by the defendant because of his anti-competitive behaviour. The recent *Lufftartsverket* case in Sweden is perhaps the most well-known example of a successful restitution claim on EC competition law grounds. There, the airline SAS obtained restitution of sums close to € 100 million for losses caused by the Swedish Board of Civil Aviation's abuse of dominance through discriminatory pricing.¹⁰⁸²

As mentioned above, restitution is, in the current stage of development of Community law, a remedy provided in principle by Community law itself.¹⁰⁸³ There is abundant Community case law that refers to restitution of charges and taxes levied in violation of Community law by public authorities. The Court has stressed in all these cases that repayment or restitution of unlawfully levied charges is required as a matter of Community law,¹⁰⁸⁴ while delegating the conditions of the exercise of this right to national law, subject to the Community law requirements of equivalence and effectiveness. Post *Courage/Manfredi*, it is not a novelty to say that under Community law there is also in principle a right of individuals as against other individuals to restitution for sums paid in violation to Community law. This is so, because the requirement of effective judicial protection should not have a different function in such private disputes.

Finally, as to the remedy of declaratory action (*Feststellungsklage*), most national legal systems recognise the possibility of a judicial declaration of the legality or illegality attached to certain facts that the plaintiff alleges.¹⁰⁸⁵ A declaratory judgment may be quite useful for a litigant, because it states clearly the legal situation at a specific point in time with a *res judicata* effect *inter partes*. In the context of competition law, such judgments may declare that a certain agreement or conduct is legal or illegal according to the Treaty competition

¹⁰⁸⁰ For Greece see Art. 904 of the Civil Code; further Iliopoulos, *supra* (2000), pp. 303-304. In France compare the specific and atypical provision of Art. L442-6(3)(b) *Code de commerce*, according to which restitution may be claimed on behalf of the victim of certain anti-competitive practices by the public prosecutor and by the Minister of the Economy.

¹⁰⁸¹ For a Greek case, see Eirinodikeio Thessaloniki n° 722/1983, 4 RHDE 187 (1984), where the court considered that a dominant undertaking (in that case, Olympic Airways, a legal monopolist at that time) had abused its dominant position in imposing an unfairly high cancellation fee covering the whole price of an air ticket to an individual. The court ordered Olympic Airways to retribute to its client a certain percentage of the ticket price, to the extent of this constituting unjustified enrichment. For further national cases see Ritter, Braun and Rawlinson, *supra* (2000), p. 928, fn. 1055.

¹⁰⁸² On this case, see Bernitz, *supra* (2003), p. 198.

¹⁰⁸³ See above on former AG's Van Gerven's system of Community law remedies.

¹⁰⁸⁴ See above.

¹⁰⁸⁵ Declaratory claims are always filed against a specific defendant, i.e. they introduce *inter partes* proceedings.

provisions.¹⁰⁸⁶ To give an example, under the new system of enforcement they may declare that an agreement is legal, either because it does not fall under Article 81(1) EC or because it satisfies the conditions of Article 81(3) EC.¹⁰⁸⁷ More specifically, they may also declare the validity or nullity of an agreement on the basis of Article 81(2) EC.¹⁰⁸⁸ In this context, reference is made to the *actions en nullité*, recognised in some Romanic legal systems.¹⁰⁸⁹

2. The Procedural Law Framework

a. National Procedural Divergences and the Challenge for an Effective System of EC Private Enforcement

As mentioned above, Community law does not in principle deal with the detailed procedural questions pertaining to its application by national courts. Those questions are subject to national procedural laws, pursuant to the principle of institutional or procedural autonomy of the Member States.¹⁰⁹⁰ Yet, this reference to national law does not mean a *carte blanche* delegation. Again, national procedural autonomy finds its limits in the Community law principles of equivalence or non-discrimination and effectiveness.

National procedures may differ a lot among the EU Member States, especially between civil and common law systems. Indeed, at times there is not even agreement as to what constitutes

¹⁰⁸⁶ See on such declaratory civil claims Erämetsä, *supra* (2001), p. 220; Gröning, *supra* (2001a), p. 582. See also s. 14(5)(a) of the 2002 Irish Competition Act, which explicitly refers to such civil claims.

¹⁰⁸⁷ It should be stressed that, in the public enforcement context, such a declaratory “positive” decision can only be taken by the Commission and not by NCAs. This, however, does not affect national courts’ power to do so under their national procedural laws (see also Ehlermann, *supra* (2000b), p. 3). It should be stressed that such civil proceedings presuppose the existence of a genuine dispute between the parties and should not be considered as *ex parte*. Neither should they be seen as alternative to the old system of notification and exemption, in other words, it is not possible for undertakings to seek declaratory judgments on the application or non-application of Art. 81(3) EC. This concern has been raised by Whish and Sufrin, *supra* (2000), p. 151. As already explained, the concepts of negative clearance and exemption are obsolete in the new system of enforcement. Thus, courts will simply apply Art. 81 EC as a whole to a dispute before them and declare *inter partes* the applicability or inapplicability of that provision to an agreement. To speak of a competence to apply distinctively Art. 81(3) EC, no longer makes sense.

¹⁰⁸⁸ On Austrian law see Günther, *supra* (2001), p. 319; Reidlinger and Thalhammer, “Austria”, in: *Modernisation in Europe 2005, Global Competition Review Special Report* (London, 2005), p. 13. On Portuguese law, see Ruiz, *supra* (1999), p. 237. See also the national cases cited by Ritter, Braun and Rawlinson, *supra* (2000), p. 927, fn. 1051.

¹⁰⁸⁹ On Belgian law, see Noirfalisse, *supra* (1994), pp. 62-63; on French law, see Boulanger, *supra* (1997), pp. 193-194.

¹⁰⁹⁰ See above.

substance and what procedure.¹⁰⁹¹ Such divergences are quite familiar to comparative lawyers, though not always apparent to EU lawyers.¹⁰⁹²

The most relevant procedural questions that arise in the enforcement of the EC competition concern the following areas:

- *Ex officio* raising of Community law issues during the proceedings: This is another example of how national procedural rules may facilitate or hinder the enforcement of Community rights. It is also an area, which EC competition law has already confronted, with a certain degree of success.
- Rules of evidence: These may vary considerably in each national procedural system. Such provisions are usually the product of the historical development of a given legal system and, though domestic lawyers might feel at ease with them, Community lawyers might find them inadequate for such complicated issues like the proof of antitrust injuries. Such rules are of utmost importance for civil antitrust cases, where complex factual situations have to be dealt with.
- Rules on time limits: Such procedural rules usually limit the time in which an action or a third-party intervention is made, or an argument may be raised before an on-going civil proceeding, or an appeal may be filed, etc.
- Rules on collective or representative claims: This is a question of particular importance for private antitrust enforcement because antitrust violations usually affect a multiplicity of market participants and indeed at times large classes of consumers. It must therefore be possible for such claims to be brought in an efficient way for the judicial system in order to serve the whole effectiveness of private enforcement.
- Procedural rules on third party interventions or on the filing of *amicus curiae* briefs, etc. can also have a great impact on effective enforcement.

While difficulties arising from such disparities or divergences can be dealt with, up to a certain extent, by having recourse to the Community law principles of equivalence and effectiveness under the guidance of the Court of Justice (negative integration), there are problems that necessitate some form of sectoral procedural harmonisation (positive integration). Equivalence and effectiveness and the “reactive” approach of the Court of Justice have their limits and cannot guarantee a level-playing field in private antitrust

¹⁰⁹¹ The problem from a private international law angle is treated by Panagopoulos, “Substance and Procedure in Private International Law”, 1 JPIL 69 (2005).

¹⁰⁹² To give an example, provisions on prescription or extinction of rights are considered to form part of substantive law in civil law countries and are usually included in Civil Codes. On the other hand, in common law, such provisions are thought of as procedural.

enforcement in Europe. Therefore, a more “pro-active” approach is necessary in order to ensure a more balanced, consistent and effective enforcement of EC competition law in national courts.

b. The *ex officio* Application of EC Competition Law

A specific principle of procedural law that has long attracted attention in the decentralised enforcement of Community law by national courts is the principle of “party-initiative” in the civil trial, which prescribes a rather passive role for the judge, according to which the civil proceedings are based on the parties’ initiative, who have the task to put forward their case.¹⁰⁹³ Pursuant to this principle, a court cannot raise points not raised by the parties and cannot grant relief other than what has been sought by the latter. Another similar principle of procedural law that affects judicial protection of Community rights before national courts is the limited degree of review in appeal proceedings. These principles are invariably present in all Member States’ judicial systems and their aim is to provide for the overall sustainability of the judicial system.

National principles on the party-initiative principle and on the passivity of the judge in civil proceedings seem to constitute a more serious obstacle for the application of EC competition law in common law jurisdictions, where the adversarial system of adjudication functions in such a way, as to make counsel the dominant figure, who raises all relevant issues. Thus, English and Irish¹⁰⁹⁴ courts have proven quite reluctant in raising Community law points *ex proprio motu*. On the other hand, continental courts may find it easier to raise the EC competition law point *ex officio*, because of the more active role of the judge throughout the proceedings, which, though in principle adversarial, follow the principle *iura novit curia*. Thus, it is increasingly accepted that courts should take up EC competition issues even *ex officio*, in the same way as they are entitled or even obliged to do with equivalent national rules of binding nature.¹⁰⁹⁵

¹⁰⁹³ See Braakman, *supra* (2000), p. 169.

¹⁰⁹⁴ See Maher, *supra* (1994), p. 276.

¹⁰⁹⁵ On the situation in Italy, see Ligustro, *supra* (1992), p. 256. On Austrian law, see Günther, *supra* (2001), p. 354 *et seq.* In France, courts have often reached inconsistent decisions as to the extent of the judge’s duties to take up questions of EC competition law that have not been raised or proved by the parties, though in general it is accepted that such questions constitute *moyens d’ordre public* and that, while the courts cannot rely on facts not brought forward by the litigants, they still have the power to raise legal issues *ex proprio motu*, pursuant to the principle *iura novit curia*. See further Boulanger, *supra* (1997), pp. 224-226. Belgian law, on its part, imposes upon the judges the duty to raise of their own motion legal questions pertaining to *ordre public* (Art. 774 *Code judiciaire*). EC competition law would fall under the definition of such public policy, therefore,

There is a rather well-developed case law by the Court of Justice on this question. The Court has recognised on numerous occasions that there are situations when the function of such national principles may be an obstacle to the effectiveness of Community law and to effective judicial protection. Starting with *Verholen*,¹⁰⁹⁶ the Court initially followed a rather reserved approach.¹⁰⁹⁷ Dealing with the question whether Community law precludes a national court from assessing of its own motion whether national rules are in conformity with a directive, for which the implementation period has elapsed, when the person concerned has not relied on that directive before the court, the Court, perhaps due to the formulation of the preliminary question itself, adopted a rather negative and defensive formula. It held that the recognised right of an individual to rely before a national court on a directive where the period for transposition has expired, *does not preclude* the power for the national court to take that directive into consideration even if the individual has not relied on it.¹⁰⁹⁸

This question was further clarified in *Van Schijndel*¹⁰⁹⁹ and *Peterbroeck*.¹¹⁰⁰ In the former case the Court of Justice distinguished three situations under national procedural law: duty, discretion and incompetence of national courts to apply *ex officio* binding rules of national law.¹¹⁰¹ The Court held that in the first two situations, national courts are under a *duty* to apply binding rules of EC law, such as competition law, even *ex officio*. Only in the third case are they exempt of such a duty. *Peterbroeck*, decided on the same day as *Van Schijndel*,¹¹⁰² emphasised an additional element to be taken into account: the access of a national court to the preliminary reference procedure. This possibility was indeed treated by the Court as an additional criterion for the effective judicial protection of rights conferred by Community

it is accepted that Belgian courts would have to raise such issues even *ex officio*. See further Spiritus Dassel, "On the Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 615, fn. 5. In Greek law the position is that national courts are under a duty to apply Community law as a whole even *ex officio*, in the same way as they are under such a duty when mandatory national law is concerned. See Georgiades, *supra* (1997), p. 85. In Danish law it is accepted that Community law principles have limited the scope of certain principles of Danish civil procedural law concerning *ultra petita*, the passivity of the civil judge, and party initiative. While under s. 338 of the Administration of Justice Act the court can only consider arguments relied upon by the parties, s. 339 mitigates this rule by allowing for the court to invite parties to express their position as to legal or factual questions of relevance. It is accepted that Danish judges are now under a duty to draw the parties' attention and to give them guidance as to arguments based on Community law. See Biering, "The Application of EU Law in Denmark: 1986 to 2000", 37 CMLRev. 925 (2000), p. 966, who, however, acknowledges that Danish judges are not particularly accustomed to this more active role.

¹⁰⁹⁶ Cases C-87/90, C-88/90 and C-89/90, *Verholen et al. v. Sociale Verzekeringsbank Amsterdam*, [1991] ECR I-3757, paras. 12-16.

¹⁰⁹⁷ See Vilaras, *supra* (2004), p. 44.

¹⁰⁹⁸ *Verholen*, *op.cit.*, para. 15.

¹⁰⁹⁹ Cited *supra*.

¹¹⁰⁰ Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, [1995] ECR I-4599.

¹¹⁰¹ *Van Schijndel*, *op.cit.*, paras. 13, 14 and 22.

¹¹⁰² On the two judgments, see Canivet and Huglo, "L'obligation pour le juge judiciaire national d'appliquer d'office le droit communautaire au regard des arrêts *Jeroen Van Schijndel* et *Peterbroeck*", (1996-4) *Europe* 1.

law. In *Peterbroeck*, it was stressed that if a national court is the first court or tribunal that can refer a preliminary question on Community law to the Court of Justice, then that court must raise questions of Community law of its own motion, even if the parties failed to raise such questions before another tribunal of a lower instance that is however considered not as a “court or tribunal” under Article 234 EC.¹¹⁰³

It should be mentioned that *Van Schijndel* did not directly touch upon the question whether the EC competition rules are “binding rules” that presumably must be taken into account *ex officio* under the majority of national procedural laws. Most civil law systems consider that courts can raise *ex proprio motu* such binding rules, as a matter of public policy (*moyens d'ordre public*). The Court’s hesitance to touch upon this question might be explained by the absence of similar notions in the much more “adversarial” common law systems. Indeed, Advocate General Jacobs did not favour the invariable recognition of the EC competition rules as *moyens d'ordre public* under Community law, especially as there was no agreement among the legal systems of the Member States as to what constitutes a matter of public policy.¹¹⁰⁴

That issue was not clarified in *Kraaijeveld*,¹¹⁰⁵ although appearances may be that the Court of Justice considers all Community law rules as “binding”, therefore giving rise to a duty for national courts to raise them *ex officio*, when there is a similar duty or even a discretion under their national law. Such an inference, however, ought to be resisted because the question thus far put to the Court of Justice by these preliminary references was not whether and which Community rules are “binding rules”, but rather whether national judges must raise Community law questions *ex officio* when there is a discretion under national law to do so with regard to certain categories of national law. In other words, what can be attributed to the Court is not so much a finding that all Community rules are “binding rules” but rather a sort

¹¹⁰³ *Peterbroeck*, *op.cit.*, paras. 11-21.

¹¹⁰⁴ *Van Schijndel*, *op.cit.*, AG’s Opinion, para. 37. Compare Lenaerts, “De quelques principes généraux du droit de la procédure devant le juge communautaire”, in: Vandersanden & de Walsche (Eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. I (Bruxelles, 2003), p. 246, who, while recognising that the notion of *moyens d'ordre public* is not well-defined in Community law, stresses that the conditions of the admissibility of direct actions for annulment, vices or gaps in the reasoning of Community acts, and infringements of essential procedural requirements and certain fundamental principles of Community law are usually raised *ex officio* by the Community Courts and can well be considered to be such *moyens d'ordre public*. See e.g. case T-243/94, *British Steel plc. v. Commission*, [1997] ECR II-1887, para. 68, where the CFI considered that the principle of the protection of legitimate expectations is “a matter of Community public policy”. See further Vesterdorf, “Le relevé d’office par le juge communautaire”, in: Colneric, Edward *et al.* (Eds.), *Une Communauté de droit, Festschrift für Gil Carlos Rodríguez Iglesias* (Berlin, 2003), p. 551 *et seq.*

¹¹⁰⁵ Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV v. Gedeputeerde Staten van Zuid-Holland*, [1996] ECR I-5403, paras. 55-62.

of “most favoured treatment” for Community law in the procedural context of the EU Member State courts.

However, the explicit recognition in *Eco Swiss* of the competition rules as of public policy (*ordre public*)¹¹⁰⁶ and the powerful statements both in *Eco Swiss* and in *Courage* as to the constitutional importance of those rules,¹¹⁰⁷ lead to the conclusion that, indeed, the Court of Justice now sees the EC competition rules as pertaining to public policy. Reading the *Van Schijndel* and *Peterbroeck* judgments in light of *Eco Swiss* and *Courage*, means that those national legal systems that recognise the raising *ex officio* of *moyens d'ordre public*, should do exactly the same with regard to EC competition law, without it being necessary to refer to the three situations of *Van Schijndel*.¹¹⁰⁸ This approach has very recently been followed by the Court of Justice in *Manfredi*, which stresses that “Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts”.¹¹⁰⁹ In so holding, the Court referred only to *Eco Swiss* and not to *Van Schijndel* and to the latter ruling’s more elaborate conditions on the *ex officio* application of Community competition law by national courts. Indeed, *Manfredi* seems to go even further in recognising an unqualified duty of national courts to raise EC competition law questions *ex proprio motu*, even if the legal system in question is not familiar with the concept of *moyens d'ordre public* or follows a very strict view of the judge’s power to raise legal questions *ex officio*.

Before concluding on this question, we should mention that Regulation 1/2003 has affected only slightly the *Van Schijndel* state of affairs, although other commentators are of the view that Article 3(1) of the new Regulation, which deals with the relationship between Community and national competition laws, imposes now a general duty upon national courts to apply Articles 81 and 82 EC and, thus, by implication to raise these provisions *ex officio*.¹¹¹⁰ We respectfully disagree and stress that Article 3, a provision that must be seen in its particular context, aims primarily at imposing a duty upon national competition authorities

¹¹⁰⁶ *Eco Swiss*, *op.cit.*, para. 39. Admittedly, the Court refers here to a different notion of “public policy”, to *ordre public international* for the purpose of enforcement of foreign arbitral awards. Yet, the reasoning used to reach that conclusion means that EC competition law pertains to public policy, also when the latter notion is used in different contexts. See *infra* on the many notions of public policy.

¹¹⁰⁷ See *supra*.

¹¹⁰⁸ See further Ehlermann and Komninos, *supra* (2001), p. 780, fn. 90; Niboyet, “La réception du droit communautaire en droit judiciaire interne et international”, in: Bergé & Niboyet (Eds.), *La réception du droit communautaire en droit privé des États membres* (Bruxelles, 2003), p. 176; Broomhall and Goyder, *supra* (2005), p. 6.

¹¹⁰⁹ *Manfredi*, *op.cit.*, para. 31.

¹¹¹⁰ See Idot, *supra* (2003c), p. 6; *idem*, *supra* (2004c), p. 39; Blaise and Idot, *supra* (2003a), p. 296; Poillot-Peruzzetto, “Mise en œuvre des articles 81 et 82 sur le fondement du règlement n° 1/2003”, 14(6) *Contr.Conc.Consomm.* 29 (2004), p. 31. Compare also para. 28 of AG Geelhoed’s Opinion in *ASNEF-EQUIFAX*, *op.cit.*, who seems to think that Art. 3(1) Reg. 1/2003 has changed the legal reality and the “faculty to apply Community law has been transformed to an obligation” (unofficial translation).

and national courts to cumulatively apply EC competition law - even *ex officio* - only where they apply their national competition law to conduct falling under Articles 81 and 82 EC. In other words the ultimate aim of this provision is to ensure the supremacy of EC competition law, and not to regulate the procedural conditions for the application of such law by national courts.

Thus, the *Van Schijndel* principles continue being relevant,¹¹¹¹ if a national court is not applying its national competition law. In this case, if national procedural law allows, the national court in question would be under a Community law duty to raise EC competition law *ex officio*. In addition, it is possible that national competition rules may not be considered public policy rules,¹¹¹² unlike the Community competition ones. In such a case, Article 3 of Regulation 1/2003 would not, by itself, impose a duty over the courts to apply EC competition law, if those courts do not have to apply of their own motion national competition law. Yet, this may not necessarily be so under the *Van Schijndel* case law, which may lead to the *ex officio* application of Community competition law. Article 3, however, may provide for a solution and fill a gap, if the national court applies its national but not EC competition law and if *Van Schijndel* cannot help, because the national procedural principles (such as the principle of passivity of justice in civil litigation) prescribe a very limited role for the judges in the direction of the proceedings and, thus, do not allow for the *ex officio* application of EC law.

In any event, as we mentioned above, if the *Van Schijndel* principles are supposed to have been rendered obsolete, this is so not because of Article 3 of Regulation 1/2003, but rather as a result of the latest development of the Court of Justice's case law in *Eco Swiss*, *Courage* and *Manfredi*, which points to an unqualified duty by national courts to apply the Treaty competition rules *ex officio*, because of the Community public policy nature of these rules.

c. Rules of Evidence

One of the most important limitations of litigating antitrust disputes is that litigation follows the adversarial system, unlike administrative authorities that follow the inquisitorial system. This means that civil courts rely on the information provided by the parties and have no tools to have access to information held by third parties such as the Commission or administrative

¹¹¹¹ This appears to be the view of the Commission, which restates in para. 3 of its new co-operation Notice the *Van Schijndel* principles.

¹¹¹² As was the case in *Eco Swiss* with the previous Dutch Competition Act which according to the *Hoge Raad* did not qualify as a matter of public policy.

authorities have. In addition, competition law disputes are characterised by vast information asymmetries between the litigants. Usually, most of the inculpatory information will be in the hands of the defendant(s) while the plaintiff will be merely relying on indicia. These problems are particularly grave for stand-alone actions.

Although competition law is not unique in this regard, and other areas of law that pertain to the public interest, such as corporate or labour law are routinely adjudicated before civil courts,¹¹¹³ competition law presupposes an extensive degree of market information. This is true of Articles 81(1) and 82 EC, and more so of Article 81(3) EC. The four conditions of the latter provision may be particularly demanding and may require a substantial degree of market information. Particularly the two positive conditions, i.e. the improvement of the production or distribution of goods or the promotion of technical or economic progress, and the allowance of a fair share of the resulting benefit to consumers, are certainly not easy to apply and the courts have to rely heavily on the parties for the necessary information and evidence.¹¹¹⁴

The problem of proof is the most serious obstacle towards an effective private enforcement.¹¹¹⁵ This becomes more evident, as some national courts seem to require a high standard of proof in competition cases.¹¹¹⁶

An “institutional” approach to that problem would be to introduce specific competition courts, whose members would possess the requisite expertise to deal with the relevant disputes.¹¹¹⁷ This is a course that up to a certain extent has been taken up in some countries, though not only with regard to competition law, but rather with regard to commercial law disputes in general.¹¹¹⁸ The introduction of specialised courts would entail high costs and

¹¹¹³ See Burrichter, *supra* (2001), p. 541.

¹¹¹⁴ See Hirsch, *supra* (2003), p. 239.

¹¹¹⁵ See Wißmann, *supra* (2000), p. 132.

¹¹¹⁶ This is the case in England, where the High Court has suggested that a high degree of probability should be required in Art. 81 EC cases. See *Shearson Lehman Hutton Inc. v. Maclaine Watson & Co. Ltd.* (QB), [1989] 3 CMLR 429; *contra Georgios Panayiotou (George Michael) et al. v. Sony Music Entertainment (U.K.) Limited* (Ch.D), [1994] ECC 395. The CAT has confirmed, however, that the balance of probabilities remains the applicable standard in cases of infringements of the Competition Act (*Napp Pharmaceutical Holdings Ltd. v. DGFT*, [2002] ECC 177; *Attheraces Ltd & Anr v. The British Horseracing Board & Anr* (Ch.D), [2005] EWHC 3015). In interlocutory proceedings the balance of convenience remains the required test (see *Easyjet v. British Airways* (QB), [1998] EuLR 350). In Ireland the standard of proof is the balance of probabilities (see Maher, *supra* (1999), p. 81).

¹¹¹⁷ See Goyder, *supra* (2001), pp. 575-576; Gröning, *supra* (2001a), p. 588; Canivet, “Concurrence : entre droit et politique”, *Les Annonces de la Seine*, 13-6-2002, No. 36, 1, p. 5.

¹¹¹⁸ This is the case in France, where a certain degree of specialisation has been attained following recent legislation. An Ordonnance of 4 November 2004 has allocated competition law-related civil claims to specialised courts of first instance, commercial tribunals and courts of appeal (see now Art. L420-7 *Code de commerce*). The list of these courts was recently determined by decree. As of January 1st 2006, there are only eight civil courts of first instance having competence to hear French and EC competition law cases, while all

might give rise to problems of conflicts of competences,¹¹¹⁹ but appears to be an appropriate long-term solution. In this regard, there is of course a certain contradiction between the recent drive of modernisation and private enforcement, if the most effective way to enhance the latter is by centralising courts and competition law-related litigation.

Another institutional solution would be to have the Commission fill this gap through the co-operation mechanism of Article 15 of Regulation 1/2003, whereby national courts request from the former information in its possession or its opinion.¹¹²⁰ However, such an option would in essence result in overburdening the Commission and, thus, in cancelling the basic stated aim of the recent reforms, to enable the Commission to use its limited resources for the persecution of the most flagrant violations of the Treaty competition rules.¹¹²¹ In addition, the co-operation mechanism of Article 15 of the new procedural Regulation has a different rationale than transforming the Commission into an investigator for the benefit of national litigation at the request of national courts.¹¹²² Similarly, one must reject an unqualified proposal to use the national competition authorities in the above sense, although their proximity to civil litigation and the fact that the civil action may be more interesting for the public interest at the national than at the Community level, means that such possibilities of assistance do exist.¹¹²³

appeals are concentrated at the Paris Court of Appeal. A certain degree of specialisation is also attained in England, where CPR Practice Direction B12 requires plaintiffs in Art. 81 and 82 EC cases to bring their claims or apply for the transferral of existing such claims to the Chancery Division of the High Court (see also Rule 30.8 of CPR Part 30 Transfer). Such specialised courts, however, must be distinguished from the “market courts” of some Scandinavian countries, which should be seen more as judicial review courts or even as making part of the competition authorities themselves, and not as specialised civil courts of private enforcement. The case is different with regard to courts that, apart from having judicial review tasks, are also competent to hear civil actions for damages. To our knowledge, the only such example is the Competition Appeal Tribunal (CAT) in the UK.

¹¹¹⁹ For an example of such conflicts of competences, compare the state of affairs in the UK with regard to the right to bring a claim for damages before the CAT and the existing right to bring similar claims before the ordinary courts (i.e. in the Chancery Division of the High Court of Justice in England and the Court of Session in Scotland).

¹¹²⁰ See above on the possibilities for private litigants to request the disclosure of information held by the Commission, in order to facilitate their civil claims before national courts.

¹¹²¹ See also case T-77/95, *Syndicat Français de l'Express International et al. v. Commission*, [1997] ECR II-1, para. 58, where the CFI upheld the Commission's decision not to pursue a complaint and accepted that in that occasion the object of the Commission pursuing the case would only be “to make it easier for the complainant to prove fault in an action for damages in a national court”. The CFI's judgment was further reversed by the ECJ in case C-119/97, *UFEX (ex SFEI) et al. v. Commission*, [1999] ECR I-1341, although the latter did not refer explicitly to that point made by the former.

¹¹²² Compare, however, the interesting reference to the Commission as “resource-centre for the national courts” by former Commissioner Monti, *supra* (2001), p. 4. See also Temple Lang, *supra* (2004a), p. 133, arguing that the Commission may be under an Article 10 EC duty to provide information to national civil proceedings, especially in case of consumer plaintiffs, when it has already adopted a formal decision (presumably finding illegal behaviour).

¹¹²³ See e.g. Canivet, *supra* (1996), p. 107.

A radical solution to address the problem of proof before national courts would be simply to follow the US model and introduce a system of pre-trial discovery, at least with regard to pre-trial oral testimony. Such an option is not realistic, however, in view of the particular features of civil procedure, especially in continental countries, where proceedings do not terminate in one trial that has to be prepared in advance. In addition, such an innovation cannot be sector-specific but would have to apply to the whole of civil procedure.¹¹²⁴ The Commission's Green Paper has recognised the difficulties in introducing pre-trial discovery and places emphasis on effective case management on the part of the national courts, through the organisation of case management conferences or pre-hearing reviews.¹¹²⁵ A possibility examined by the Green Paper is a form of court-ordered discovery based on fact-pleading, whereby the plaintiff has set out in detail the relevant facts and has presented reasonably available evidence in support of his allegations.¹¹²⁶ This proposal finds support in the recent Community Directive on the enforcement of intellectual property rights, which provides for a degree of discovery based on fact-pleading by reference to evidence that lies in the control of one of the parties.¹¹²⁷ A slightly more advanced proposal is a form of mandatory disclosure of classes of documents by court order.¹¹²⁸

Information asymmetries, on the other hand, could be remedied through the introduction by means of Community legislation of a procedural duty on the defendant (in a case where EC competition law is pleaded as sword) to bear the burden of proof for certain facts that have occurred in his sphere of influence. Thus, if the plaintiff advances *prima facie* evidence of an anti-competitive practice, it would be upon the defendant to prove the lawfulness of the practice in question by providing precise information.¹¹²⁹ Reversal of the burden of proof is not unknown to Community law. Indeed, it has been adopted by Community Directives in the

¹¹²⁴ See Basedow, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 34.

¹¹²⁵ Staff Working Paper, para. 56.

¹¹²⁶ Option 1 of the Green Paper.

¹¹²⁷ Directive 2004/48/EC, Art. 6(1). See also, in the area of consumer protection, *Council Directive 84/450/EEC of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising*, [1984] L 250/17 (as subsequently amended by Dir. 97/55/EC), Art. 6, according to which Member States' courts must have the powers to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case.

¹¹²⁸ Option 2 of the Green Paper.

¹¹²⁹ See Basedow, "Panel One Discussion: Substantive Remedies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 34.

area of sex discrimination.¹¹³⁰ The recent Directive on the enforcement of intellectual property rights also provides for a presumption of authorship/ownership for the author of a literary or artistic work if his name appears in that work, in the absence of proof to the contrary.¹¹³¹

In the competition field, it is even more interesting that the Commission has increasingly solicited and accepted commitments by private parties, usually in merger cases¹¹³² but also in some Article 81 and 82 EC cases, whereby one of the commitments essentially refers to a shift of the burden of proof in favour of third parties wishing to challenge certain conduct of the undertaking that has offered the commitment. To give an example, in the German book price-fixing case, an Article 81 EC case, the Commission decided to terminate proceedings and granted a negative clearance through a comfort letter¹¹³³ after accepting commitments by German booksellers and publishers that guaranteed the freedom of direct cross-border selling of German books to final consumers in Germany. The commitments also established an exclusive list of conditions under which German booksellers and publishers could exceptionally stop such cross-border sales if found to be a circumvention of the book price-fixing agreements. The listed categories of circumvention were to be interpreted restrictively and the burden of proof rested with the booksellers and publishers invoking circumvention.¹¹³⁴

The problems relating to the proof of the anti-competitive conduct in question may recede, if there is already a Commission or a national competition authority decision that has dealt with the facts of an antitrust infringement. We have already explained in detail above that such findings do not produce a positive binding effect on national civil proceedings and that Article 16(1) of Regulation 1/2003 and *Masterfoods* merely establish a negative duty not to contradict and not a positive duty to follow Commission decisions. In any event, there are already precedents, where national courts have treated the findings of the Commission as conclusive evidence. Thus, in *Iberian* the English High Court held that if the same parties have disputed an issue before the European Commission and have had a reasonable opportunity to challenge the Commission's decision, they are estopped of pleading anew that

¹¹³⁰ Directive 97/80/EC, Art. 4.

¹¹³¹ Directive 2004/48/EC, Art. 5.

¹¹³² See e.g. Commission Decision of 25 August 2005 (M.3687–*Johnson&Johnson/Guidant*), section F, para. 37(vi) of the attached commitments.

¹¹³³ This took place in 2002, i.e. long before Art. 9 Reg. 1/2003 was applicable.

¹¹³⁴ On this case, see Nehl and Nuijten, "Commission Ends Competition Proceedings Regarding German Book Price Fixing Agreements Following Acceptance of an Undertaking on Cross-border Sales", (2002-2) *EC Competition Policy Newsletter* 35, pp. 36-37.

issue and of contradicting the Commission's view in the civil proceedings.¹¹³⁵ We stress again that such pronouncements are based more on the principles of procedural economy and prohibition of abuse of process by parties, rather than on a Community law obligation to respect the findings of the Commission. Of course, national law may itself introduce such a binding effect and this is indeed the solution adopted by the new UK and German Competition Acts.¹¹³⁶ These rules, which do not establish a general principle of precedence of public over private enforcement, are meant only to provide an incentive for follow-on civil actions for damages when there is already a final Commission or national competition authority infringement decision.¹¹³⁷ The Commission views such solutions positively¹¹³⁸ but, in our view, the Commission would be well-advised not to propose secondary Community legislation conferring a positive binding effect on such public enforcement decisions, because this would create in the long run a philosophy of dependence of private on public enforcement and would lead to the wrong conviction that private antitrust enforcement is just about follow-on actions. The Commission could, on the other hand, consider proposing the reversal of the burden of proof in such cases, which would still be an important incentive for plaintiffs without affecting the current status in the relationship between private and public enforcement.

d. Collective and Representative Claims

A more pro-active private enforcement of the Treaty competition rules at the national level depends on the possibility of classes of market participants and consumers to pursue their Treaty-based rights in a collective manner. This also serves well the efficiency of the judicial system and avoids costs and waste of judicial resources. The recent litigation in Italy against the members of a cartel of insurance companies, where individual consumers brought separately hundreds of costly civil suits eventually leading to damages awards of sums close

¹¹³⁵ See the English *Iberian* case (*op.cit.*).

¹¹³⁶ See above.

¹¹³⁷ Likewise, in the United States section 5(a) of the Clayton Act allows private litigants to rely on a judgment or decree in a pre-existing civil or criminal action by the government and use those as *prima facie* evidence of an antitrust violation. The text of that provision goes as follows: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto..."

¹¹³⁸ Option 8 of the Green Paper.

to € 20 for each plaintiff, is neither an example of efficient use of judicial resources, nor of deterrence for cartel members.¹¹³⁹

The introduction of US style class actions does not find favour in Europe. Class action lawsuits are usually brought in federal court if the claim arises under federal law (as US antitrust law is), or if any member of the potential plaintiff class and the defendant are from different states. Nationwide plaintiff classes are possible, but such suits must have a commonality of issues across state lines. This may be difficult as the civil law in the various states has significant differences and thus the set of claims may have to be handled separately in each state or through the device of multi-district litigation (MDL). It is also possible to bring a class action under state law, and in some cases the court may extend its jurisdiction to all the members of the class, including out of state (or even internationally) as the key element is the jurisdiction that the court has over the defendant. In US class actions, one or more persons belonging to a broad class of persons that have been harmed by anti-competitive practices bring an action on behalf of the unidentified class of persons, although the former might not have asked for the permission of those persons individually. An injured party is thus assumed to be included in the class unless he chooses not to be (opt-out). The judgment, however, has *res judicata* effect for all members of the class, even for those that did not participate to the process, after some formalities are seen to.¹¹⁴⁰

US class actions, coupled with pre-trial discovery, have indeed led to excesses in the US. They can lead to blackmailing and extortions of huge sums by class action lawyers from companies that wish to avoid the costs and uncertainties (not least because of the jury trial system) of protracted litigation.¹¹⁴¹ There is no doubt that such a development in Europe must

¹¹³⁹ See above.

¹¹⁴⁰ See further Ebbing, "Class Action, Die Gruppenklage: Ein Vorbild für das deutsche Recht?", 103 ZVgl.RWiss. 31 (2004), p. 35 *et seq.*

¹¹⁴¹ To give a telling example, as a result of the *Microsoft* settlement in Minnesota, customers got vouchers worth up to \$ 29 to buy new products, while the class action lawyers cashed \$ 59.4 million. It is also noteworthy that in the California class action against Microsoft the plaintiffs' lawyers were awarded over \$100 million in fees. In another class action litigation, a defendant had to pay \$ 1.9 million for postage to mail out the notices of a class action settlement to those indirect purchasers for whom there were addresses, a minority of the theoretical class. If that is what postage costs, one can imagine what the other administrative costs are, like printing, stuffing envelopes, buying advertisements, etc. Note, however, that the recent US Class Action Fairness Act of 2005 aims at curbing some of the excesses associated with class actions. Thus, it shifts many large class-action lawsuits involving parties from state courts that historically have been more receptive to plaintiffs, to federal courts. Business groups had lobbied for the legislation, arguing that class-action lawsuits enriched trial lawyers. The Act reduces the likelihood that out-of-state defendants will be subject to excessive verdicts, by reducing settlements that may occur in plaintiff-friendly local venues such as California. It also enacts procedures for the review of coupon settlements, to reduce lawyers' fees that are deemed excessive relative to the benefits actually passed on to the class members.

be avoided at all costs. Indeed, the Commission has made clear in its Green Paper that “the ultimate objective should be to foster a competition culture, not a litigation culture”.¹¹⁴²

This bad precedent, however, should not stand in the way of the efforts to encourage collective or representative claims, basically brought by consumer unions.¹¹⁴³ Indeed, some commentators consider that national courts are already under a duty based on Article 10 EC to allow such class actions for injunctions or damages by consumer organisations.¹¹⁴⁴ Collective claims have also found favour with a recent Opinion of Advocate General Jacobs:

“Collective rights of action are a ... common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents.”¹¹⁴⁵

The Commission’s Green Paper proceeds to make a useful distinction between (a) “representative claims”, brought by a representative natural or legal person, such as a consumer organisation, on behalf of a group of identified individuals and aimed at protecting the individual rights of those represented, (b) “collective claims”, brought on behalf of a group of identified or identifiable individuals and aimed at protecting interests of those represented, and (c) “public interest litigation”, aiming at the benefit of the public at large and resulting to an award to the natural or legal person who brought the action or to those who suffered the damage.¹¹⁴⁶

The choice of an appropriate model for such claims can be influenced by already existing or proposed mechanisms in Community and national law. One of the Community mechanisms is the proposed European small claims procedure, which aims at simplifying and speeding up litigation concerning small claims and at reducing costs.¹¹⁴⁷ At the national level, the recently amended UK Competition Act provides for claims for damages brought on behalf of

¹¹⁴² Green Paper, para. 12.

¹¹⁴³ Compare the public statements of Commissioner Kroes on 17 October 2005 referring to the desirability of collective claims in antitrust cases.

¹¹⁴⁴ See Temple Lang, *supra* (2004a), p. 133; *idem, supra* (2004b), p. 1917.

¹¹⁴⁵ Para. 48 of AG Jacobs’s Opinion in case C-195/98, *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v. Austria*, [2004] ECR I-10497.

¹¹⁴⁶ Staff Working Paper, para. 192.

¹¹⁴⁷ *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a European Small Claims Procedure*, COM(2005) 87 final. In reality, if adopted, this procedure will directly apply to EC competition law infringements too and will cover claims for sums not exceeding € 2,000.

consumers by representative groups “specified” by order of the Secretary of State,¹¹⁴⁸ while the 2002 Swedish Group Proceedings Act, which is not competition law-specific, provides for opt-in representative claims.¹¹⁴⁹

e. Other Procedural Questions

Other procedural rules, such as rules on time limits and third-party interventions may also be critical for the effectiveness of private antitrust enforcement. Such rules are subject to national law and can give rise to divergences or inconsistencies.

The Court of Justice has on numerous occasions in the past dealt with such rules and has followed an *ad hoc* approach, in determining whether they offend against the Community principles of equivalence and effectiveness. Since these are merely “detailed procedural rules” not affecting the core of the exercise of Community rights,¹¹⁵⁰ the Court follows a more relaxed standard of effectiveness, which former Advocate General Van Gerven describes as “non-impossibility”.¹¹⁵¹ This has also been termed a “procedural rule of reason”.¹¹⁵² According to this test, which was first pronounced in *Van Schijndel* and *Peterbroek*,¹¹⁵³ “each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.”

One should note that in holding national procedural rules, such as provisions on limitations, compatible with the Community requirement of effectiveness, the Court has in reality compared those rules with equivalent rules in other Member States. Thus, following a sort of “majoritarian rule”, it has found limitation periods “not excessively short compared with those prescribed in the legal systems of the other Member States”.¹¹⁵⁴ Such a criterion, which

¹¹⁴⁸ See above.

¹¹⁴⁹ Staff Working Paper, para. 196.

¹¹⁵⁰ See case C-255/04, *Commission v. France*, *op.cit.*, para. 40; *Manfredi*, *op.cit.*, para. 62.

¹¹⁵¹ See above.

¹¹⁵² See Prechal, “Community Law in National Courts: The Lessons from *Van Schijndel*”, 35 CMLRev. 681 (1998), p. 690 *et seq.*

¹¹⁵³ *Van Schijndel*, *op.cit.*, para. 19; *Peterbroeck*, *op.cit.*, para. 14.

¹¹⁵⁴ E.g. *Eco Swiss*, *op.cit.*, para. 45.

necessitates a degree of comparative research of the Member States' legal systems, makes part of a "reasonableness" test to be applied in such cases.¹¹⁵⁵

In addition, although the *Van Schijndel* and *Peterbroeck* test may not admit this expressly, the Court, in balancing national procedural rules against the effectiveness of Community law, often attributes a high degree of deference to Community rules of a higher ranking in the constitutional scheme of the Treaty, such as the competition rules.¹¹⁵⁶ Both in *Eco Swiss* and *Courage* there were emphatic references to Article 3(1)(g) EC, which elevates Article 81 EC to a fundamental provision, "which is essential for the tasks entrusted to the Community and, in particular, for the functioning of the internal market".¹¹⁵⁷ This means that the Community law requirement of effectiveness may be much more demanding, when national procedural rules create obstacles to the effectiveness and efficiency of private antitrust enforcement.

With regard to limitation periods for bringing actions for damages for violation of the Community competition rules, such periods vary considerably between the Member States. It cannot be indeed excluded that a very short limitation period may offend against the principle of effectiveness and make the exercise of the Community right in damages excessively difficult. Such cases could be dealt with on an *ad hoc* basis by the national courts under the possible guidance of the Court of Justice. More important than the period itself is, however, its starting point.¹¹⁵⁸ Among the many issues dealt with by the Court of Justice in *Manfredi* was this specific question. The Court held that "a national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended".¹¹⁵⁹ According to the Court, where there are continuous or repeated infringements, such a limitation period might expire even before the infringement is brought to an end, in which case it would be

¹¹⁵⁵ That such a criterion may be, at least implicitly, decisive, may be adduced from *Peterbroeck*, where the Belgian procedural rule in question was extrajudicially described by AG Jacobs as "rather restrictive by comparison with equivalent rules in other Member States". See Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997), p. 32.

¹¹⁵⁶ See De Búrca, "Differentiation within the Core: The Case of the Common Market", in: De Búrca & Scott (Eds.), *Constitutional Change in the EU, From Uniformity to Flexibility* (Oxford/Portland, 2000), p. 149.

¹¹⁵⁷ *Eco Swiss*, *op.cit.*, para. 36; *Courage*, *op.cit.*, para. 20.

¹¹⁵⁸ See Staff Working Paper, para. 261 *et seq.* The Green Paper has not included an option to harmonise limitation periods but deals only with the question of their starting point. This means that time limits are most likely to continue being subject to national law in the foreseeable future.

¹¹⁵⁹ *Manfredi*, *op.cit.*, para. 78.

impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.

The Commission Green Paper had already identified this particular problem and includes an option to suspend the limitation periods from the moment proceedings are instituted by the Commission or national competition authorities, thus facilitating follow-on civil claims for damages.¹¹⁶⁰

¹¹⁶⁰ Option 36 of the Green Paper. Compare also s. 33(5) of the German Competition Act, as recently amended.

D. ARBITRATION AND EC COMPETITION LAW

1. Arbitration and Community Competition Law: Contradiction and Complementarity

Any discussion of private antitrust enforcement and application of EC competition rules by courts cannot ignore arbitration. Arbitration is a very ancient institution, used by individuals and recognised by States as a dispute resolution mechanism alternative to litigation. At the same time, arbitration is the creation of the private autonomy of the parties, who withdraw the regulation of their disputes from state justice through a contract, the arbitration agreement. The arbitrators are called upon to resolve a certain dispute that has been submitted to them by the parties and do so by applying the law that is applicable to the merits of the dispute.¹¹⁶¹ The agreement to arbitrate is an enforceable contract that binds the parties and excludes the courts' jurisdiction to deal with the dispute. The arbitrators' final decision, the arbitral award, produces the same fundamental effects like judgments: it enjoys *res judicata* and, subject to certain formalities, is enforceable. In most developed legal systems, courts may not review arbitral awards in their substance (*révision au fond*), unless for very narrow grounds, and may set them aside or refuse their recognition or enforcement, if certain conditions are met, which are rather exceptional, especially in the case of international commercial arbitration.

In today's highly commercialised world an ever growing number of business disputes is submitted to arbitration, which is considered to be a much more preferable forum than state justice in many respects, most notably due to its globally perceived independence, neutrality, impartiality, flexibility, confidentiality, time and cost efficiency, and technical expertise.¹¹⁶² In the international level, in particular, it is rare for a commercial contract of a certain economic significance not to contain an arbitration clause,¹¹⁶³ while the very successful

¹¹⁶¹ This may be the law of a state, but also legal principles not connected to any particular state, of a transnational nature. Such can be the *lex mercatoria* or the international law merchant, or the *UNIDROIT Principles of Contract Law*. Arbitrators may also be bound to decide by reference to no law whatsoever, usually *ex aequo et bono* or as *amiable compositeurs*. Again this is hardly the space for a further discussion of those questions. For more details see K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague/London/Boston, 1999); Rubino-Sammartano, "Amiable compositeur (Joint Mandate to Settle) and *ex bono et aequo* (Discretionary Authority to Mitigate Strict Law: Apparent Synonyms Revisited)", 9(1) *JInt'l Arb.* 5 (1992); E. Gaillard and J. Savage (Eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague/Boston/London, 1999), p. 801 *et seq.*; Marrella, "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts", 36 *Vand.JTransnat'l L.* 1137 (2003), p. 1158 *et seq.*

¹¹⁶² See e.g. *Fouchard, Gaillard, Goldman, supra* (1999), p. 1.

¹¹⁶³ Parties to international commercial agreements usually submit their disputes to institutional arbitration (as opposed to *ad hoc* arbitration). In institutional arbitration, arbitral proceedings are administered by an

United Nations New York Convention of 1958 on recognition and enforcement of foreign arbitral awards¹¹⁶⁴ makes it easier to enforce an arbitral award than a court judgment in another country.¹¹⁶⁵ It is indicative of the importance of arbitration for the global development of commerce that all newly independent states consider accession to that convention an absolute priority.

A commentator has used the following words in this regard:

“Merchants will not conduct business across national boundaries if there is no guarantee of either basic contractual accountability or the provision of remedies for material breach of contract. Arbitration civilizes the international marketplace and thereby makes it accessible to commercial parties ... [Arbitration] makes the risks of transborder commerce palatable”.¹¹⁶⁶

Arbitration and competition law are quite a strange pair. They can be regarded as inherently contradictory and incompatible, but also as inherently complementary and compatible to each other.

Inherently contradictory and incompatible, because arbitration is the creation of private autonomy. Its basis is the agreement of the parties to submit a future or current dispute to private individuals, the arbitrators, whom they themselves choose, thus voluntarily withdrawing the regulation of their rights and obligations from the ambit of public justice. On the other hand, competition law is the state mechanism, whose function is to restrain inappropriate private conduct in the market,¹¹⁶⁷ in order to maximise the benefits of the

institution in accordance with its rules of arbitration. Such an institution is *par excellence* the International Chamber of Commerce (ICC), based in Paris. To give some statistics, in 2004 alone, 561 requests for arbitration were filed with the ICC concerning 1,682 parties from 116 different countries. The place of arbitration was located in 49 different countries throughout the world and arbitrators of 61 different nationalities were appointed or confirmed under the ICC Rules. The amount in dispute exceeded \$ 1 million in 58.8 % of new cases (ICC Statistics in: <http://www.iccwbo.org/court/arbitration/id4198/index.html>).

¹¹⁶⁴ *United Nations New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards*, entry into force on 7 June 1959; published in: 330 UNTS 38 (1959), no. 4739; in force in more than 140 countries and territories.

¹¹⁶⁵ While EU Member States have concluded an international convention on recognition and enforcement of foreign judgments, the 1968 Brussels Convention, which has now been transformed to a Community Regulation (Reg. 44/2001), such an instrument does not yet exist in the global context. An initiative that was undertaken by the Hague Conference on Private International Law in the mid-1990s came to a standstill in 2001. Finally, the Hague Conference adopted in 2005 a less ambitious text applicable only to choice-of-forum agreements and not to jurisdiction and recognition/enforcement of foreign judgments. This explains, up to certain degree, the preferred status of arbitration as an international business dispute mechanism.

¹¹⁶⁶ See Carbonneau, “The Exercise of Contract Freedom in the Making of Arbitration Agreements”, 36 *Vand.JTransnat’lL* 1189 (2003), p. 1195.

¹¹⁶⁷ The fact that competition law seeks to restrain private autonomy seems at first side paradoxical. However, such regulation of competition is necessary in order to avoid collusion among firms in a way that is only profitable to them but is detrimental to the competitive process, to consumer welfare and to the society at large.

economic activity of firms for the public good. In that sense, private autonomy is subject to control for the public interest. That explains the *public policy* nature of such rules.

However, arbitration and competition law are also complementary and compatible with each other. First of all, because arbitration is *par excellence* an institution that flourishes in a free market economy system with freedom of commerce and competition.¹¹⁶⁸ The more the competitive commerce of goods and services, the stronger the presence of arbitration. Arbitration and *Community* competition law, in particular, may have even more in common. The competition rules of the Treaty of Rome have long been considered in their functional single market perspective.¹¹⁶⁹ They were also intended to constitute the most prominent and necessary flanking measure, in order to attain a true common market. Competition-restrictive agreements, according to the Court of Justice, would tend to restore the national divisions in trade between Member States, namely to reconstruct trade barriers already abolished by the Treaty of Rome. "The Treaty, whose preamble and content aim at abolishing the barriers between States ... could not allow undertakings to reconstruct such barriers".¹¹⁷⁰ In other words, what the Treaty prohibited among States, could not be made possible by agreements among private parties.¹¹⁷¹

Interestingly enough, arbitration is also a means to attain the objective of a common market. If the possibility to conclude arbitration agreements and to enforce arbitral awards in the international context has always been considered a great incentive for the development of trade in goods and services and for the mobility of persons among different nations, *a fortiori* this should be the case of the European Union. Indeed, the Treaty of Rome had realised the importance of arbitration for a common market by inducing the Member States in Article 293

¹¹⁶⁸ See e.g. Libertini, *supra* (2002), p. 433, who considers private autonomy and freedom of competition as two pillars of the market economy system. A recognition of a high degree of private autonomy is a *sine qua non* condition for the establishment of effective competition in the market. However, it is also possible that private autonomy might be exercised in an anti-competitive way.

¹¹⁶⁹ Outside the EU context, free trade and free competition are not, of course, dependent on each other. It is perfectly possible for a satisfactory degree of domestic competition to exist even in a country that is closed to the international flows of trade. At the same time, it is possible for a country nominally open to foreign trade or for a free trade area to be entirely cartelised, so that free competition remains in the market. Ideally, free trade and free competition should go together. While this is not always feasible in the global context, in the EU the two are correlated and constitute perennial objectives pursuant to Arts. 2, 3, and 4 EC.

¹¹⁷⁰ Cases 56/64 and 58/64, *Etablissements Consten S.A.R.L. and Grundig-Verkaufs-GmbH v. Commission*, [1966] ECR 299, at 340.

¹¹⁷¹ See also para. 13 of the Art. 81(3) EC Notice, according to which "the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of the consumers".

EC *in fine* to enter into negotiations with each other and to conclude agreements simplifying formalities governing the reciprocal recognition and enforcement of arbitration awards.¹¹⁷²

2. The Relationship between EC Competition Law and Arbitration: A Developmental Perspective

a. Introduction

The problem of the application of EC competition law by the arbitrators is not a new one.¹¹⁷³ It has attracted attention both from the side of Community and competition lawyers and from the side of arbitration specialists. In practice, the relationship between arbitration and EC competition law has followed the dual nature of contradiction and complementarity that we have just described. The initial approach of both has been rather conflictual. In the early stages of EC competition law enforcement, arbitration was seen quite suspiciously by the EC antitrust enforcement milieu. This suspicion, not to say hostility, was due to the fear that arbitration might be used by companies as a dangerous platform to break the antitrust rules, without risking detection by the Commission, national competition authorities or courts. The

¹¹⁷² That provision referred also to recognition and enforcement of judgments. While the then EEC Member States proceeded to the conclusion of the 1968 Brussels Convention, no similar course was taken with regard to arbitral awards, because the 1958 New York Convention had come meanwhile into force. See in this context the Jenard Report of the 1968 Brussels Convention, OJ [1979] C59/1, p. 13. The New York Convention was signed by the majority of the then EEC Member States (Italy acceded in 1969) and addressed in a very satisfactory way the exigencies of the common market. Currently, all EU Member States are party to that convention.

¹¹⁷³ There is an abundant literature on this relationship. See *inter alia* Steindorff, "Common Market Antitrust Law in Civil Proceedings Before National Courts and Arbitrators", in: Hawk (Ed.), *Antitrust and Trade Policy in the United States and the European Community 1985, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1986); the volume published by the International Chamber of Commerce: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993); Slot, "The Enforcement of EC Competition Law in Arbitral Proceedings", 23(1) LIEI 101 (1996); Idot, "Arbitrage et droit communautaire", (1996) RDAI/IBLJ 561; various contributors, in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997); Komninos, *supra* (2001), p. 214 *et seq.*; various contributors, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003). Among the various monographs, see D. Hahn, *L'arbitrage commercial international en Suisse face aux règles de concurrence de la CEE* (Genève, 1983); C. Baudenbacher and A.K. Schnyder, *Die Bedeutung des EG-Kartellrechts für Schweizer Schiedsgerichte* (Basel/Frankfurt a.M., 1996); W. Abdelgawad, *Arbitrage et droit de la concurrence, Contribution à l'étude des rapports entre ordre spontané et ordre organisé* (Paris, 2001); N. Spiegel, *Kartellprivatrecht in der internationalen Handelsschiedsgerichtsbarkeit* (Baden-Baden, 2002); M. Blessing, *EG/US Kartellrecht in internationalen Schiedsverfahren - 77 Aktuelle Fragen aus der Praxis* (Basel, 2002); *idem*, *Arbitrating Antitrust and Merger Control Issues* (Basel/Geneva/Munich, 2003); N. Shelkopyas, *The Application of EC Law in Arbitration Proceedings* (Groningen, 2003); P. Zobel, *Schiedsgerichtsbarkeit und Gemeinschaftsrecht, Im Spannungszusammenhang zwischen Integration und Exklusion* (Tübingen, 2005); P. Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague, 2006); G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies, A Novel Supranational Paradigm in the Making?* (Groningen, 2006).

specific characteristics of confidentiality, neutrality and finality of arbitration were seen as particularly alarming. Such a possibility was basically correlated with anecdotal evidence that international arbitrators sitting in non-EU jurisdictions, which were important arbitration centres, were not paying due deference to the EC competition rules.¹¹⁷⁴

The arbitration milieu, on its part, initially saw EC competition law and the wide powers of enforcement of the European Commission with some suspicion, if not fear. The public policy nature of the competition rules and the fact that until comparatively recently these rules were not considered arbitrable created a rather defensive attitude of arbitrators who were usually preferring to avoid dealing with such problematic questions, rather than risk their awards' non-enforcement or annulment on public policy or non-arbitrability grounds. At the same time, arbitration specialists rejected what they saw as the Commission's interventionist and disrespectful approach vis-à-vis arbitration.¹¹⁷⁵

However, this stance has certainly changed in the last decade or so. The Commission has no longer obliged the parties to an exempted agreement to notify future arbitral awards, and current block exemption regulations do not contain provisions on the withdrawal of the block exemption's protection in the event of an offending arbitral award. Indeed, of late, one may even speak of an embrace of arbitration by the Commission as an alternative dispute resolution mechanism that can be complementary to competition law enforcement. Thus, quite surprisingly, there has been a whole series of recent merger decisions, clearing concentrations subject to certain conditions or obligations, one of which is recourse to arbitration for certain disputes. In those cases arbitration is used as a procedural remedy that ensures that parties comply by their - usually - behavioural commitments. The same has also happened in the antitrust area with certain old Article 81(3) EC exemption decisions and certain new commitment decisions (pursuant to Article 9 of Regulation 1/2003). This "delegation" of competition law enforcement to private justice constitutes a clear indicator of some complementarity between arbitration and competition law.¹¹⁷⁶

¹¹⁷⁴ See the "classical" anecdote used by Jacques Werner, "Application of Competition Laws by Arbitrators: The Step Too Far", 12(1) *Jint'l Arb* 21 (1995), p. 23, referring to a real case: Two EC companies had concluded an agreement infringing Art. 81 EC. The agreement was subject to Swiss law and arbitration took place in Switzerland. Only one copy of the agreement existed, and this was hidden in a Swiss bank. When the dispute started, the arbitrators were asked to examine the contract, but not to mention it in their decision.

¹¹⁷⁵ This refers to the duties imposed by the Commission on private parties, through some old individual and block exemptions, to notify to it arbitration proceedings and arbitral awards. The Commission had also intervened once in the past to enjoin parties from enforcing an arbitral award that was considered objectionable. On all these questions, see below.

¹¹⁷⁶ The term "delegation" is not used in the strictly legal sense but rather in a political science one.

The same change of climate can be sensed in the arbitration side. Arbitrators currently feel much more at ease with competition rules and refer to them as a matter of course, indeed, exceptionally they even raise them *ex officio*. Arbitrators and arbitration specialists have also seen positively the recent embrace of arbitration by the Commission and the proposed use of arbitration in Commission decisions. This has meant increased opportunities for arbitration in an area where its flexibility, informality and swiftness can be critical. The “new” relationship between arbitration and EC competition law must also be seen in the context of the recent reforms of competition law enforcement in the EU, where there is a shift from a predominantly public enforcement system to a more litigation-based model, which is characterised by an increased role of private enforcement. Since arbitration is an alternative forum for the resolution of business disputes, indeed, the dominant forum for international business disputes, it is certainly affected by this shift.

b. Conflict and Distrust

aa. Arbitration Clauses/Agreements as Anti-competitive Agreements

A first question is whether the arbitration agreement itself is immune from or subject to the EC competition rules. It may be surprising at first sight that a dispute resolution mechanism may have an anti-competitive nature, thus being tainted with illegality and voidness. Particularly so, since arbitration proceedings are considered as functionally equivalent to court proceedings and are recognised as *lis pendens*, while the decisions that are produced as a result of these proceedings, the arbitral awards, are recognised as equivalent to court judgments by national legal systems, are invested with *res judicata* effect, and can be enforceable. Nevertheless, the fact that an arbitration agreement can be itself subject to the rules against restrictions of competition is the mere consequence of the contractual basis of arbitration. An arbitration agreement is the basis of the arbitration proceedings, but it is also a contract and, as such, cannot escape the application of rules limiting or regulating private autonomy.

i. The Parallel of Settlements

At this point it might be useful through an *excursus* to view from a competition law perspective some other agreements that resemble, in the effects they produce, the arbitration

agreements. Settlements, either judicial or out-of-court ones, are agreements that put an end to a dispute as between the parties and in most legal systems can be enforced in a way similar to an arbitral award or, indeed, a judgment. Judicial settlements, in particular, can have in some jurisdictions *res judicata* effect between the parties and may even constitute an enforceable act or be so declared by a court.¹¹⁷⁷ Indeed, some jurisdictions encourage the conclusion of settlements, as a way to relieve overloaded court dockets.

Notwithstanding these specificities, the Commission has treated invariably such agreements as falling under the Treaty competition rules.¹¹⁷⁸ Thus, in one specific case, the Commission intervened directly against the initial version of a settlement that contained certain unacceptable clauses. The settlement was between a complainant to the Commission and an undertaking, whose conduct was the subject matter of the complaint. It was initially agreed that the complainant would receive ECU 4 million as damages, while he should not directly or indirectly encourage the Commission to pursue the case. In case the Commission decided to proceed to a statement of objections referring to practices originating in the complaint, the complainant had to partially reimburse the undertaking with regard to the damages paid. These particular clauses alerted the Commission and were later amended by the settling parties, so that the rights of the complainant were safeguarded. According to the Commission the settlement in question in its original version would have been contrary to public policy and, thus, void.¹¹⁷⁹

Usually settlements pertain to intellectual property rights cases¹¹⁸⁰ and in their majority constitute trademark delimitation agreements.¹¹⁸¹ These are agreements, where parties owning trademarks liable to be confused agree upon some forms of territorial restrictions in

¹¹⁷⁷ This is the case for example of German (§ 794(1)(5) ZPO) and Greek law (Arts. 214A(5) and 904(2)(c) of the Greek Code of Civil Procedure).

¹¹⁷⁸ See e.g. Nikpay and Faull, "Article 81", in: Faull & Nikpay (Eds.), *The EC Law of Competition* (Oxford, 1999), p. 75; Ritter, Braun and Rawlinson, *supra* (2000), pp. 671-673; Tritton, Davis, Edenborough, Graham, Malynicz and Roughton, *supra* (2002), pp. 693-702; Keeling, *supra* (2003), p. 358 *et seq.*; Treacy, "Settlement Agreements: The European Perspective", 1 *JIntell.PL&P* 223 (2006).

¹¹⁷⁹ See Chevalier, "Clauses suspectes dans un accord de règlement à l'amiable", 3(1) *EC Competition Policy Newsletter* 8 (1997). Of course, it is not the competence of the Commission to declare the contrariety to *ordre public* or the nullity as such of settlement agreements, as indeed, the Commission in this case did not do. The Commission can only intervene as administrative authority against undertakings that conclude anti-competitive agreements or abuse their dominant position. It is regrettable that the Commission services did not disclose more details of this case.

¹¹⁸⁰ For a US antitrust perspective see Hovenkamp, Janis and Lemley, "Anti-competitive Settlement of Intellectual Property Disputes", 87 *Minn.LRev.* 1719 (2003), p. 1721 *et seq.*

¹¹⁸¹ See e.g. Commission Decision 82/897/EEC of 15 December 1982 (*Toltecs/Dorset*), OJ [1982] L 379/19, upheld on substance by the ECJ in case 35/83, *BAT Cigaretten-Fabriken GmbH v. Commission*, [1985] ECR 363. With regard to settlement and non-assertion agreements in technology transfer cases (patent and know-how licensing) see *Commission Notice - Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements*, OJ [2004] C 101/2, para. 204 *et seq.*

the use of the trademarks, thus usually putting an end to protracted litigation. Such agreements fall under the prohibition of Article 81(1) EC, if their main object or effect is simply to partition the markets and not to agree on the trademarks to be used in various jurisdictions.¹¹⁸² Such agreements may be out-of-court settlements, which settle disputes before they ever reach the courts,¹¹⁸³ but, quite remarkably, may also be judicial or in-court settlements, which put an end to an on-going litigation.

The Court of Justice has treated such settlements with caution, balancing on the one hand the principle of private autonomy, as expressed in those agreements, and the public interest expressed in the prohibition of anti-competitive agreements. Thus, it has stressed that such agreements to settle current or potential litigation, which can be judicial or out-of-court settlements, and which may constitute judicial acts in the former case, are capable of falling within the prohibition of Article 81(1) EC, since that provision “makes no distinction between agreements whose purpose is to put an end to litigation and those concluded with other aims in mind”.¹¹⁸⁴

National courts have also recognised the public policy nature of the EC competition rules in subjecting such settlements to the pertinent prohibitions of the Treaty. Thus, the French *Cour de Cassation*¹¹⁸⁵ quashed a lower judgment that had refused to examine the Article 81(2) EC nullity of a patent licensing agreement, because the parties had concluded a settlement having the force of *res judicata*.¹¹⁸⁶ The French Supreme Court stressed the *ordre public* nature of the Treaty competition rules and considered, therefore, that the nullity of Article 81(2) EC could not be settled.¹¹⁸⁷ Apart from national provisions which can provide for safeguards

¹¹⁸² In the *Bayer/Tanabe* case, reported in the *Commission VIIIth Report on Competition Policy - 1978* (Brussels/Luxembourg, 1979), paras. 125-127, the Commission scrutinised a settlement agreement between two owners of two potentially confusing trademarks, but concluded that it raised no competition concerns, since it only settled the question of the appearance of one of the two trademarks, without partitioning the markets. Interestingly enough, in this case too, one of the contractual obligations in the settlement was the withdrawal of a complaint to the Commission made by one of the two parties. The Commission, apparently, because of the nature of the case in question, did not pick this issue up.

¹¹⁸³ This is the case of the abovementioned *Toltecs/Dorset* Decision.

¹¹⁸⁴ Case 65/86, *Bayer AG and Maschinenfabrik Hennecke GmbH v. Heinz Süllhöfer*, [1988] ECR 5249, paras. 14-15. See also Case 258/78, *L.C. Nungesser KG and Kurt Eisele v. Commission (Maize Seed)*, [1982] ECR 2015, paras. 80-89.

¹¹⁸⁵ Cass.com., 26-3-79, *Ateliers de Construction de Compiègne v. Fabry*, cited by Loÿ, “L’application en France du droit communautaire de la concurrence”, 16 RTDE 438 (1980), p. 452; Boulanger, *supra* (1997), pp. 224 and 292.

¹¹⁸⁶ Art. 2052(1) *Code Civil*.

¹¹⁸⁷ Arts. 6 and 2045(1) *Code Civil*. This case was however decided much earlier than the more liberal judgments of French courts with regard to the arbitrability of EC competition law disputes at the beginning of the 1990s. It may be that a French court will now accept that such disputes can be settled, but in a way not violating *ordre public*. For a German ruling holding that judicial settlements are not exempt of Article 81 EC and of German antitrust law, see BGH, 5.7.2005, X ZR 14/03, 55 WuW 1029 (2005). See further Beater, “Kartellverbot und Vergleichsvereinbarung”, 50 WuW 584 (2000), p. 585 *et seq.*

against the courts' sanctioning anti-competitive settlements that contradict *ordre public*, Community law itself, and in particular Article 10 EC, leads to the same result. It is clear from that provision that a national court cannot uphold private action that is incompatible with the Treaty competition rules.¹¹⁸⁸

ii. The Principle of Independence of the Arbitration Clause/Agreement

After this *excursus*, we come now to the question whether an arbitration agreement or clause can itself be an agreement prohibited by the competition rules. Exactly as with the case of settlements, an arbitration agreement itself cannot be immune to the competition rules. However, there are two important distinctions that have to be made.

First, the fact that an anti-competitive and therefore null and void agreement contains an arbitration clause has no bearing at all on the civil enforceability and validity of the arbitration clause/agreement itself. Under the globally-recognised doctrine of separability or severability, the arbitration agreement is separate from the main agreement and the illegality and vices of the latter do not affect the former. The arbitration agreement will be affected only if it is itself illegal or if there are vices that refer to itself, irrespective of the main agreement.¹¹⁸⁹ This will happen in rather rare circumstances. Thus, as long as the arbitration clause itself is valid and worded sufficiently broadly, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity. A principle related to separability is the principle of competence-competence, according to which arbitrators are judges of their own jurisdiction and are entitled to rule on their own competence. Therefore, if the validity of the arbitration agreement itself and thus their competence is at stake, arbitrators do not have to defer to state courts but can continue the arbitration and consider whether they have jurisdiction.¹¹⁹⁰

¹¹⁸⁸ Compare *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, COM(2004) 718 final, Art. 5(1), which provides that settlement agreements pursuant to mediation must not be contrary to Community law.

¹¹⁸⁹ In such a case, the arbitrators would have no other option but to declare themselves incompetent.

¹¹⁹⁰ On the principles of separability and competence-competence, see *inter alia* Rogers and Launders, "Separability - The Indestructible Arbitration Clause", 10 *Arb.Int'l* 77 (1994); Rosen, "Arbitration under Private International Law: The Doctrines of Separability and *Compétence de la Compétence*", 17 *Fordham Int'l LJ* 599 (1994); Dimolitsa, "Autonomie et 'Kompetenz-Kompetenz'", (1998) *Rev.Arb.* 305; Gaillard, "The Negative Effect of Competence-Competence", 17(1) *Mealey's International Arbitration Report* 27 (2002); Smit, "Separability and Competence-Competence in International Arbitration: *Ex nihilo nihil fit?* Or Can Something Indeed Come from Nothing?", 13 *Am.Rev.Int'l Arb.* 19 (2002); Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", 36 *Vand.JTransnat'l L.* 1115 (2003).

Second, unlike settlements which can directly fall under the competition law prohibitions because they define the market conduct of the contracting parties and therefore can directly affect competition in the market, arbitration agreements can only indirectly fall under Articles 81 and 82 EC, if they strengthen or put in effect a main agreement which itself directly falls under these rules. In other words, it is not the function or the aim of an arbitration agreement to define the conduct of the parties in the market, but rather to resolve a dispute, which itself may refer indeed to an agreement that defines market conduct and thus affects competition.¹¹⁹¹ This means that it will only be in exceptional cases that the arbitration agreement or clause in question will be caught by Articles 81 and 82 EC. In those exceptional cases, the arbitration agreement will be invalid not because the doctrine of civil separability recedes but rather because the Article 81 or 82 EC illegality taints the arbitration agreement itself. This is an important conceptual point.

iii. Arbitration Clauses/Agreements that Are by Themselves Anti-competitive

The early years of the tension between EC competition law and arbitration offer some examples of arbitration clauses that were considered to be anti-competitive by themselves. Thus, in some old Commission Decisions, although arbitration is not usually condemned as an institution, the existence of arbitration clauses has been found, in the Commission's view, to have a function supportive of anti-competitive main agreements.

In *International Quinine Cartel*,¹¹⁹² a case concerning price and quota-fixing for supplying quinine globally, the parties had expressly excluded the then EEC from the scope of their agreement, but had concluded "gentlemen's agreements" extending the anti-competitive clauses to the common market. The gentlemen's agreements were enforceable by arbitration

¹¹⁹¹ The only purely theoretical case where an arbitration agreement may directly define market conduct and thus affect competition, is when the parties agree in the arbitration agreement to eliminate or distort competition with regard to the *market for arbitration-related services* itself. In those cases, arbitration would be of interest to competition law not as a *dispute resolution mechanism* but as a *market*. It is difficult to find an example for such a case, because the parties to the arbitration agreement will not have market power in the sense of being able to influence in an appreciable way the market for arbitration-related services (a situation of oligopsony or monopsony). We leave aside here the question whether the competition rules apply to the market for arbitration-related services from the other side (oligopoly or monopoly). Indeed, there is no doubt that the competition rules could in principle apply to certain price-fixing arrangements between arbitrators or arbitration institutions. This is a question, however, that is of no interest to us here, since it has nothing to do with arbitration agreements or clauses. If there is something anti-competitive here, this is not the arbitration clause that makes a dispute subject to an arbitration institution but rather the price-fixing arrangements of that institution.

¹¹⁹² Commission Decision 69/240/EEC of 16 July 1969 (*International Quinine Agreement*), JO [1969] L 192/5.

procedures.¹¹⁹³ The Commission had no difficulty in considering these anti-competitive practices as agreements in the Article 81 EC sense, notwithstanding their definition by the parties as “gentlemen’s agreements”. In finding an agreement, the Commission relied on the facts that they provided for certain obligations for the parties, and, interestingly enough, that these obligations could be enforced through an arbitration mechanism.¹¹⁹⁴ It appears, therefore, that the arbitration agreement itself strengthened the effectiveness of those practices and contributed to their qualification as agreements.¹¹⁹⁵

Reassuringly, in some other cases the Commission has stressed that an arbitration agreement or scheme is not normally subject to the prohibition of Articles 81 and 82 EC.¹¹⁹⁶ The overall object and effect of an arbitration clause is to submit certain current or future disputes to an independent third party, the arbitrator, instead of seizing the state courts with these disputes. Nevertheless, the Commission could not exclude that the function of an arbitration clause in an anti-competitive agreement (e.g., in a tie-in) can exceptionally be such as to increase the competition-restraining function of the unlawful practice. In such cases it could be with certainty foreseen that the arbitral tribunal, when deciding, would violate EC competition law. Therefore, the arbitration clause itself would be caught by the Article 81(1) EC prohibition and would be void under Article 81(2) EC.

In its *Stoves and Heaters* Decision the Commission did indeed prohibit a cartel agreement that included such an arbitration clause, because in effect the latter constituted a means of dissuading firms from establishing their position on the market through competitive effort, thus contributing to the circumvention of the EC rules on competition. In this case, the arbitral tribunals were considered as simply an integrated part of the cartel itself, thus being not impartial and independent adjudicatory bodies. Instead they could be expected to render awards that would uphold the anti-competitive cartel, thus imposing a coherent and precise system of anti-competitive restrictions.¹¹⁹⁷

¹¹⁹³ It is not clear from the text of that Decision what was intended by “arbitration procedures”. It seems that some of these “gentlemen’s agreements” left it to the parties whether to go to arbitration or whether to submit their disputes to ordinary courts.

¹¹⁹⁴ *International Quinine Agreement* Decision, *op.cit.*, para. 19.

¹¹⁹⁵ The inclusion of an arbitration clause, which is itself an agreement, into a written accord obviously reinforces the latter’s contractual nature.

¹¹⁹⁶ Commission Decision 72/25/EEC of 22 December 1971 (*Burroughs-Delplanque*), JO [1972] L 13/50; Commission Decision 72/237/EEC of 9 June 1972 (*Davidson Rubber Co.*), JO [1972] L 143/31.

¹¹⁹⁷ Commission Decision 75/358/EEC of 3 June 1975 (*Stoves and Heaters*), OJ [1975] L 159/22. For another similar case see Commission Decision 78/59/EEC 2 December 1977 (*Centraal Bureau voor de Rijwielhandel*), OJ [1978] L 20/18, where the creation of an arbitral tribunal itself aggravated the restrictive effects of an anti-competitive agreement. See also Hahn, *supra* (1983), p. 77 *et seq.*; Steindorff, *supra* (1986), p. 431; Von Zumbusch, “Arbitrability of Antitrust Claims Under US, German and EEC Law: The ‘International Transaction’ Criterion and Public Policy”, 22 *Texas Int’l LJ* 291 (1987), pp. 314-315.

More recently, in *Organic Peroxides*, the Commission unearthed and punished a cartel that dated back to 1971 and included among the various market-sharing and price-fixing clauses a compensation mechanism for deviations from the agreed quotas, a joint surveillance and potentially common reactions against competitors, and an arbitration system. The published version of the Decision does not give much information about the nature of that “arbitration system”, but there is no doubt that such an arbitration agreement would itself be invalid.¹¹⁹⁸ In such cases, arbitrators themselves may indeed be liable to fines under Regulation 1/2003. Arbitrators, like other professionals such as lawyers,¹¹⁹⁹ are undertakings and would act here as an ancillary vehicle that supports, reinforces and facilitates the anti-competitive conduct. It is interesting that in the *Organic Peroxides* case, the Commission did not stop at imposing fines upon the cartel members, but actually fined a Swiss-based consultancy which had acted as a secretary to the parties and facilitated the implementation of the anti-competitive agreement. The Commission found that the consultant’s role in the cartel went much further than that of a secretary: it had played an essential role in organising and implementing the cartel, and some of the additional tasks it performed had involved a certain degree of discretion and independent decision-making. In particular, it acted independently from the cartel members by undertaking an audit, which was an essential feature of the agreement. It also stored documents for the cartel participants, reimbursed travel expenses to avoid any traces of illegal meetings and provided legal services, including advice on how to avoid detection of the cartel by the antitrust authorities. There is no doubt that “arbitrators” acting as an integral mechanism of a similar cartel or of some other particularly repugnant anti-competitive structure, would be equally so liable.

bb. Arbitral Awards as Anti-competitive Agreements?

While settlements can be compared with *arbitration agreements*, the same is not true for *arbitral awards*. In contrast to settlements and arbitration clauses, which are agreements between private parties and may exceptionally constitute themselves an anti-competitive agreement, arbitral awards are not agreements in the sense of Article 81 EC. Even if arbitration has a contractual basis, the actual decision of the arbitrators cannot be seen as an

¹¹⁹⁸ Commission Decision of 10 December 2003 (*Organic Peroxides*), para. 84.

¹¹⁹⁹ Case C-35/99, *Criminal Proceedings against Mamuele Arduino*, [2002] ECR I-1529, paras. 37-38 (by implication); case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, paras. 48-49. On the definition of lawyers as “undertakings” see further A. Berlinguer, *Professione forense, impresa e concorrenza, Tendenze e itinerari nella circolazione di un modello* (Milano, 2003), p. 269 *et seq.*

anti-competitive agreement, notwithstanding the fact that the award may uphold such an agreement. To subject arbitral awards as such to the concept of “agreement” of Article 81 EC, even by analogy, would go too far. Such awards will bear the civil consequences that the law provides, namely they will be liable to annulment or non-enforcement on public policy grounds, but cannot be automatically “prohibited” or declared “void” as such, in the same way as anti-competitive agreements can.¹²⁰⁰

Of course, the Commission may prohibit *conduct* associated with an arbitration proceeding or an award, but lacks competence to directly “invalidate” the award. Therefore, even in the exceptional case described above, where the arbitration is essentially an integral part of a cartel and the arbitration clause itself is an anti-competitive and invalid agreement, the antitrust authorities cannot impugn the award itself, though they could enjoin the arbitrators – since in this case they would be mere cartel facilitators – from going on with the “arbitration” proceedings and from producing an “award”. A competition authority could also enjoin the parties from participating in the arbitration proceedings and from enforcing the award.¹²⁰¹ Indeed, the Commission has used this power in at least one case in the rather remote past.¹²⁰²

cc. Duty to Notify Arbitral Awards in Individual Exemption Decisions

Apart from the above instances, where one can speak of a more direct conflict between the arbitration agreement/proceedings and EC competition law, the European Commission has also treated suspiciously arbitration in a rather indirect way. A number of Commission decisions granting, under the old system of enforcement, individual exemptions, have imposed since the 1970s a duty on the parties to notify arbitral awards rendered in the context

¹²⁰⁰ In the competition law literature there is sometimes confusion and word is made of an arbitral award’s nullity, which is clearly not the case. See e.g. Goyder, *supra* (2003), p. 139.

¹²⁰¹ Anti-competitive recourse to dispute resolution proceedings must not be associated only with arbitration. Indeed, under EC competition law recourse to *litigation* may under certain circumstances also be anti-competitive. This is the case of vexatious litigation, which may constitute an abuse of a dominant position, if it is exercised by a dominant undertaking with a view to intimidating and to harassing the defendant. See Commission Decision of 21 May 1996 in Complaint No IV/35.268 (*ITT Promedia*), unpublished, and case T-111/96, *ITT Promedia v. Commission*, [1998] ECR II-2937, paras. 30, 55, 60, 61. For an earlier case, where the complainant had put forward arguments based on vexatious litigation and other harassing tactics see Commission Decision 87/500/EEC of 29 July 1987 (*BBI/Boosey & Hawkes: Interim Measures*), OJ [1987] L 286/36. On these cases, see Temple Lang, “European Community Antitrust Law: Innovation Markets and High Technology Industries”, 20 *Fordham Int’l LJ* 717 (1997), p. 796; Esteve Mosso and Ryan, *supra* (1999), pp. 182-183.

¹²⁰² This was the *Preflex/Lipski* case (cited *supra*). The Commission held that an agreement as interpreted by an arbitral award was incompatible with the Treaty competition rules. It did not, of course, set the arbitral award aside but communicated its objections to the parties and in essence rejected the construction given by the arbitral tribunal to the problematic contractual clause. In essence, the Commission took issue with the *agreement* as interpreted and enforced by the award and not with the award itself. On this case, see below.

of a contract that is exempted. One illustration is the *Transocean Marine Paint Association* Decision of 1973.¹²⁰³ In this case the Commission made an individual exemption conditional on the parties' informing it without delay of the results of any arbitration held with respect to some specific provisions of the agreement. On appeal, the European Court of Justice, though not specifically referring to the condition on the notification of arbitral awards, upheld the Commission's Decision, as far as the imposition of duties was concerned, stating that "since Article [81(3)] constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article [81(1)], the Commission must be in a position at any moment to check whether the conditions justifying the exemption are still present".¹²⁰⁴

This requirement has been included in a variety of individual exemption decisions¹²⁰⁵ in the form of an obligation or a condition imposed by the Commission.¹²⁰⁶ However, there has not been any evidence of an arbitral award falling short of complying with the terms of an exemption decision or of an exemption being revoked or amended because of that reason.

Meanwhile, at least for the last decade, such a requirement of notification of arbitral awards appeared less often in individual exemption decisions and was usually employed by the Commission only in special cases, most notably when arbitration was part of the internal rules of a business association and there was a pressing need to monitor certain collective schemes of those associations. In its *International Energy Agency* Decision,¹²⁰⁷ the Commission specified that an individual exemption given to an emergency allocation system among oil companies did not extend to arbitral awards, rendered under the auspices of a specified "Dispute Settlement Centre", and which resolved oil supply transaction disputes during the implementation of the emergency scheme. The implicit result of this was that such arbitral awards would have to be notified anew to the Commission in order for the emergency allocation to be exempted. More recently, in its *Eurovision* Decision of May 2000,¹²⁰⁸ the Commission granted an individual exemption pursuant to Article 81(3) EC, while imposing

¹²⁰³ Commission Decision 74/16/EEC of 21 December 1973, OJ [1974] L 19/18.

¹²⁰⁴ Case 17/74, *Transocean Marine Paint Association v. Commission* [1974] ECR 1063, para. 16.

¹²⁰⁵ See Commission Decision 72/41/EEC of 23 December 1971 (*Henkel/Colgate*), JO [1972] L 14/14; Commission Decision 75/494/EEC of 18 July 1975 (*Kabel-Metal/Luchaire*), OJ [1975] L 222/34; Commission Decision 76/172/EEC of 15 December 1975 (*Bayer/Gist-Brocades*), OJ [1976] L 30/13; Commission Decision 78/253/EEC of 23 December 1977 (*Campari*), OJ [1978] L 70/69; Commission Decision 83/390/EEC of 13 July 1983 (*Rockwell/Iveco*), OJ [1983] L 224/19; Commission Decision 77/543/EEC of 25 July 1977 (*De Laval/Stork*), OJ [1977] L 215/11, renewed by Commission Decision 88/110/EEC of 22 December 1987, OJ [1988] L 59/32; Commission Decision 89/96/EEC of 20 December 1988 (*EMO*), OJ [1989] L 37/11; Commission Decision 91/128/EEC of 15 February 1991 (*Sippa*), OJ [1991] L 60/19.

¹²⁰⁶ Obligations have usually been preferred to conditions (on their differences see *infra*). If parties failed to adhere to such obligations, the Commission could impose fines or revoke or amend the exemption.

¹²⁰⁷ Commission Decision 83/671/EEC of 12 December 1983, OJ [1983] L 376/30.

¹²⁰⁸ Commission Decision 2000/400/EC of 10 May 2000, OJ [2000] L 151/18.

an obligation to the addressee of that exemption, the European Broadcasting Union (EBU), to inform it of "all arbitration procedures under the scheme for EBU non-members' access to Eurovision sports programmes". The reference to arbitration procedures rather than to awards is unfortunate, although it is doubtful whether this echoes a deliberately more interventionist approach of the Commission towards arbitration. The *Eurovision Decision* appears to be the last exemption decision in which a duty to notify awards was imposed.

dd. Duty to Notify Arbitral Awards in Block Exemption Regulations

A certain distrust on the part of the Commission towards arbitration has also been seen in some old block exemption regulations. Thus, Article 9(1) of the old patent licensing block exemption Regulation¹²⁰⁹ dictated that if the effects of an arbitral award were incompatible with Article 81(3) EC or the block exemption itself, the Commission could withdraw the benefits accruing from the block exemption for the specific patent license.¹²¹⁰ A similar provision was included in the old block exemption Regulation on know-how licensing.¹²¹¹ These provisions were much criticised,¹²¹² because it was argued that a losing party in an arbitration could always dispatch a complaint to the Commission alleging the incompatibility of the unfavourable award with these Regulations and with Article 81(3) EC. That could transform the European Commission to a quasi-appeal tribunal, something, which conflicts with the very essence of arbitration and something that the Commission itself would rather avoid.

Encouragingly enough, the Commission has subsequently followed a more liberal approach. The current¹²¹³ and previous¹²¹⁴ block exemption Regulations on technology transfer agreements that have replaced the patent and know-how licensing Regulations, no longer included a provision on withdrawal of the block exemption's protection in the event of an offending arbitral award. A certain caution remained for some time only in some specific

¹²⁰⁹ *Commission Regulation 2349/1984 of 23 July 1984 on the Application of Article 85(1) of the Treaty to Certain Categories of Patent Licensing Agreements*, OJ [1984] L 219/15.

¹²¹⁰ In the 1979 draft patent licensing regulation (OJ [1979] C 58/12), the Commission had proposed to require parties to a patent licence qualifying under the block exemption to communicate promptly to it the terms of any arbitral award that bore on the interpretation or operation of any provision permitted or forbidden by the block exemption. This requirement was widely criticised at that time and the subsequent reaction led the Commission to delete this provision from the final text of Reg. 2349/1984.

¹²¹¹ *Commission Regulation 556/1989 of 30 November 1988 on the Application of Article 85(1) of the Treaty to Certain Categories of Know-how Licensing Agreements*, OJ [1989] L 61/1, Art. 7(1).

¹²¹² See already the comments made by DVGRUR, 80 GRUR 695 (1978). See further McClellan, "Commercial Arbitration and European Community Law", 5 Arb.Int'l 68 (1989), p. 71.

¹²¹³ Reg. 774/2004, OJ [2004] L 123/11.

¹²¹⁴ Reg. 240/1996, OJ [1996] L 31/2.

fields, mainly in the maritime transport sector. Thus, a provision that had survived the rather suspicious initial attitude of the Commission was Article 9(4) of Regulation 823/2000 on liner shipping companies (consortia),¹²¹⁵ according to which “arbitration awards and recommendations of conciliators, which have been accepted by the parties and which settle disputes concerning practices of consortia covered by this Regulation, shall be notified forthwith to the Commission by the consortium”. This provision was repealed by Regulation 463/2004¹²¹⁶ and this amendment is a good indication of the Commission’s more relaxed approach towards arbitration.¹²¹⁷ Nevertheless, the new text of Article 12(1)(c) of Regulation 823/2000, as amended by Article 1(4) of Regulation 463/2004, retains the possibility for the Commission (and now also for national competition authorities) to withdraw the benefit of the block exemption if an agreement, as interpreted and given effect by an arbitration award, produces effects that are incompatible with Article 81(3) EC.¹²¹⁸

c. Embrace and Complementarity

aa. The More General Positive Approach for Arbitration and ADR in Community Law

The reversal of the European Commission’s initial suspicious attitude towards arbitration must also be seen in the more general context of the adoption of a clear Community policy favouring alternative dispute resolution (ADR), particularly in areas pertaining to the protection of consumers. Already in 1993 the Commission had produced a Green Paper on

¹²¹⁵ *Commission Regulation 823/2000 of 19 April 2000 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Liner Shipping Companies (Consortia)*, OJ [2000] L 100/24. This text has last been amended by Commission Regulation 611/2005 of 20 April 2005, OJ [2005] L 101/10.

¹²¹⁶ *Commission Regulation 463/2004 of 12 March 2004 Amending Regulation (EC) No 823/2000 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Liner Shipping Companies (Consortia)*, OJ [2004] L 77/23, Art. 1(2)(a).

¹²¹⁷ Compare also Art. 5 of *Commission Regulation 2843/1998 of 22 December 1998 on the Form, Content and Other Details of Applications and Notifications Provided for in Council Regulations (EEC) No. 1017/68, (EEC) No. 4056/86 and (EEC) 3975/87 Applying the Rules on Competition to the Transport Sector*, OJ [1998] L 354/22, which made obligatory the notification to the Commission of “awards at arbitration and recommendations by conciliators accepted by the parties” with regard to disputes concerning some unfair pricing practices in maritime transport. This Regulation has now been repealed by *Commission Regulation 773/2004 of 7 April 2004 Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty*, OJ [2004] L 123/18.

¹²¹⁸ In particular where: (a) in a given trade, competition from outside the conference within which the consortium operates or from outside a particular consortium, is not effective; (b) a consortium fails repeatedly to comply with the obligations provided for in Art. 9 Reg. 1/2003.

consumers' access to justice,¹²¹⁹ in which it advocated the use of alternative dispute resolution methods, including arbitration, for a quick out-of-court resolution of consumer disputes. This was followed up by a Commission Action Plan in 1996,¹²²⁰ and a Commission Communication and a Recommendation in 1998.¹²²¹ The 1998 Recommendation established certain minimum standards that ADR bodies should satisfy, namely impartiality, independence, efficiency, procedure based on the adversarial principle, publicity and transparency.¹²²² These Commission initiatives were also welcomed by the Council.¹²²³

The Commission together with the Member States have now established a network of contact points or "clearing houses" (EEJ-NET), which provides consumers with information on available ADR schemes, as well as legal advice and practical help in pursuing a complaint by this means. The tasks of the EEJ-NET are to co-ordinate out-of-court-settlement procedures for consumers throughout Europe, to provide consumers with easy and informed access to such procedures cross-border, and to facilitate the resolution of cross-border consumer disputes.¹²²⁴ The network deals with any dispute between a consumer and a business (C2B) over goods and services, such as problems over deliveries, defective products, or products or services that do not fit their description. The EEJ-NET is complemented by FIN-NET which is a dedicated network dealing exclusively with consumer complaints about financial services (credit, investments, loans etc).¹²²⁵

The same favourable attitude towards ADR can be seen in the electronic commerce Directive which stipulates that Member States should ensure that their legislation does not hamper the

¹²¹⁹ *Commission Green Paper - Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, COM(93) 576 final.

¹²²⁰ *Commission Communication - Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market*, COM(96) 13 final.

¹²²¹ *Commission Communication on the Out-of-court Settlement of Consumer Disputes*, COM(98) 198 final; *Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-court Settlement of Consumer Disputes*, OJ [1998] L 115/31.

¹²²² The scope of that Recommendation was limited to procedures which lead to the settlement of a dispute through the active intervention of a third party, who proposes or imposes a solution. It did not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent. This limitation was remedied with the adoption of a Commission Communication and a Recommendation in 2001: *Commission Communication on Widening Consumer Access to Alternative Dispute Resolution*, COM(2001) 161 final; *Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out-of-court Bodies Involved in the Consensual Resolution of Consumer Disputes*, OJ [2001] L 109/56.

¹²²³ *Council Resolution of 25 May 2000 on a Community-wide Network of National Bodies for the Extra-judicial Settlement of Consumer Disputes*, OJ [2000] C 155/1.

¹²²⁴ The EEJ-NET's website address is http://ec.europa.eu/consumers/redress/out_of_court/eej_net/index_en.htm.

¹²²⁵ The FIN-NET's website address is http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm.

use of out-of-court schemes available under national law, for dispute settlement.¹²²⁶ The rationale is that electronic commerce facilitates cross-border transactions between business and consumers. Since such transactions are frequently of low value, the resolution of any dispute needs to be simple, quick and inexpensive. According to the Commission, “new technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact, and therefore should be encouraged through principles ensuring consistent and reliable standards to give all users confidence”.¹²²⁷

More generally, the Commission has recently proceeded to ADR-friendly proposals and initiatives that are not limited to the consumer protection and electronic commerce fields. Thus, in 2002 the Commission adopted a Green Paper that aims at encouraging access to ADR in all civil and commercial matters.¹²²⁸ As a follow-up to the 2002 Green Paper, a European Code of Conduct on Mediation was developed in 2004 by a group of stakeholders with the assistance of the services of the European Commission. The Code sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.¹²²⁹ The Commission has also proposed a draft directive on mediation for all civil and commercial matters.¹²³⁰

While these projects are probably oriented not at the kind of international commercial arbitration proceedings that are relevant here, they nevertheless denote a certain general positive stance of the Community vis-à-vis ADR and by implication arbitration.

bb. The Beginning of the Commission’s (Awkward) Embrace of Arbitration: The Motor Vehicles Block Exemption Regulation

The reversal of the Commission’s negative predisposition towards arbitration in the area of competition law enforcement cannot be better evidenced than in its previous and current block exemption Regulations on the motor vehicle sector. Indeed, in the previous automobile

¹²²⁶ Directive 2000/31/EC, OJ [2000] L 178/1, Art. 17.

¹²²⁷ Commission Recommendation 2001/310/EC, *op.cit.*, Recital 6.

¹²²⁸ *Commission Green Paper of 19 April 2002 on Alternative Dispute Resolution in Civil and Commercial Law*, COM(2002) 196 final. This was following the Council’s Conclusions on 29 May 2000, that had invited the Commission to draw up a Green Paper on alternative methods of settling disputes under civil and commercial law to take stock of and review the existing situation and initiate wide-ranging consultations.

¹²²⁹ The Code is available in: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

¹²³⁰ COM(2004) 718 final.

distribution Regulation¹²³¹ the Commission actually for the first time encouraged recourse to arbitration as a means of alternative dispute resolution between suppliers and dealers. According to Article 5(3) *in fine* of that Regulation, where two parties in an agreement, namely a supplier and a dealer, do not fulfil their contractual obligations, in the event of disagreement, they “must ... accept a system for the quick resolution of the dispute, such as recourse to an expert third party or an arbitrator, without prejudice to the parties’ right to apply to a competent court in conformity with the provisions of national law”. Such cases concerned either the right of the supplier to terminate the agreement if it is necessary to reorganise the whole or a substantial part of the network, or the right of one party to terminate the agreement for cause if the other party fails to perform one of its basic obligations.

Article 3(6) of the new Regulation 1400/2002 presents the same favourable attitude towards arbitration. The possibility to refer a dispute to arbitration is clearly turned to a condition for the application of the block exemption. According to the text of that provision, “the exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator”. This means that the vertical agreement will be block-exempted only if it contains an arbitration clause that covers the kind of disputes mentioned or implied by the Regulation. An express reference in the arbitration clause to those specific disputes does not seem to be necessary and a broad arbitration clause would be in our view sufficient.

Thus, dealers must have the right to submit to arbitration disputes over supply obligations, the setting or attainment of sales targets including local sales targets,¹²³² the implementation of stock requirements, the implementation of an obligation to provide or use demonstration vehicles, the conditions for the sale of different brands, and whether the termination of a dealership agreement is justified by the reasons given in the notice.¹²³³ Other disputes that will have to be submitted to arbitration (or to independent expertise) relate to the assessment of certain quality standards or requirements imposed by suppliers to authorised repairers,

¹²³¹ Commission Regulation 1475/1995 of 28 June 1995 on the Application of Art. 85(3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, OJ [1995] L 145/25.

¹²³² See Commission Document, *Frequently Asked Questions Relating to the Application of Reg. 1400/2002*, in: http://europa.eu.int/comm/competition/car_sector/distribution/faq_en.pdf, Question 9.

¹²³³ See the non-exhaustive list of Art. 3(6) Reg. 1400/2002. See also case C-125/05, *VW-Audi Forhandlerforeningen ex parte Vulcan Silkeborg A/S v. Skandinavisk Motor Co. A/S*, Judgment of 7 September 2006, not yet reported.

such as a requirement to make arrangements for replacement vehicles to be available to customers, whose own vehicles are being serviced or repaired.¹²³⁴

If the distribution system in question does not provide for the possibility of arbitration or independent expertise, the block exemption is inapplicable and the former will have to be examined under Article 81(3) EC, unless it is below the *de minimis* thresholds.¹²³⁵ It is clear from these provisions that the Commission treats arbitration as an important mechanism that ensures the quick resolution of disputes arising between the parties to a car distribution agreement that might otherwise hamper effective competition.¹²³⁶

While the Commission's positive attitude for arbitration in Regulation 1400/2002 must generally be welcomed, the Commission regrettably groups arbitration together with individual expertise and refers to them in an alternative way.¹²³⁷ In so doing, it creates very serious doubts as to whether the mechanism that is here envisaged is indeed arbitration.¹²³⁸ The two mechanisms are hardly comparable. Arbitration is a dispute resolution mechanism, alternative to state justice, that eventually leads to a decision that is recognised by law as having *res judicata* effect and as being enforceable not only domestically but also internationally. Then, most importantly, an arbitration agreement excludes state court competences, while the Regulation 1400/2002 third party-arbitrator mechanism leaves unaffected the competence of national courts to hear disputes.¹²³⁹ Individual expertise, on the other hand, is not a dispute resolution method, but only leads to the definition by a third party of a specific act of performance of a contract or of an obligation/right between two other parties. The decision of that third party binds naturally the two parties, but only on the basis of their contract. In other words, the decision of the third party does not constitute *res*

¹²³⁴ *Frequently Asked Questions, op.cit.*, Question 12 *in fine*.

¹²³⁵ The thresholds are 15% if the distribution system is purely vertical, 10% if it is horizontal, and 5% if there are cumulative effects. See *Commission Explanatory Brochure for Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector*, in: http://ec.europa.eu/comm/competition/car_sector/explanatory_brochure_en.pdf, Question 7.

¹²³⁶ See Recital 11 Reg. 1400/2002.

¹²³⁷ See the critical comments of Du Jardin, "Arbitrage v. expertise en droit de la distribution", in: *Arbitration and Commercial Distribution, Reports of the Colloquium of CEPANI (November 17th 2005)* (Bruxelles, 2005), p. 164 *et seq.*

¹²³⁸ Note that the Spanish text of the Regulation uses the term "mediador".

¹²³⁹ See Schlenger and Hinrichs, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003), p. 518. Note that Art. 3(6) *in fine* Reg. 1400/2002 provides that the arbitration envisaged in that provision is "without prejudice to each party's right to make an application to a national court" (emphasis added). It is not clear whether the Community legislator's aim was to exclude non-EU state courts and non-EU choice-of-forum clauses but the text is very problematic and inelegant. Compare also s. 5.3.2 *in fine* of the Explanatory Brochure (*op.cit.*), which states that "agreements must provide for the parties to have the right to refer any disputes on this subject to an independent expert or arbitrator or to a national court" (emphasis added). This reference seems to imply that the block exemption will indeed not be available to agreements containing non-EU choice-of-forum clauses.

judicata and is not an enforceable title. Its respect can only be attained through an action of breach of contract before a court or - possibly - an arbitrator.¹²⁴⁰

In addition, some of the disputes that Regulation 1400/2002 aims at referring to “arbitration” are not exactly the typical disputes that arbitrators would hear but are rather technical questions of economic and marketing nature that would ideally be submitted to a technical expert. Conversely, some other kinds of disputes, for example those relating to the fulfilment of the parties’ contractual obligations, are indeed more appropriate for arbitration yet the text of Regulation 1400/2002 refers to arbitration and third-party expertise in an alternative manner, although a third-party technical expert is hardly a suitable dispute resolution forum.¹²⁴¹ These and other confusions have led some commentators to hold that it is not arbitration the mechanism that Regulation 1400/2002 refers to but rather third-party expertise with some elements of dispute resolution.¹²⁴² Without going so far, it seems to us that the question whether this mechanism is arbitration in the sense of producing awards of *res judicata* that can be enforceable as such domestically and internationally, can only be answered on an *ad hoc* basis.¹²⁴³

cc. *Falling in Love*: Arbitration in Merger Clearance Decisions

i. The Commission’s Practice in Accepting Commitments in Merger Clearance Cases

¹²⁴⁰ Occasionally, it may be difficult to distinguish between the two. See e.g. Efeteio Athens n° 174/2002, 51 *Nomiko Vima* 1638 (2002), where the Athens Court of Appeal declared non-existent an arbitral award that had been rendered in a third party-expertise case. See also Kantonsgericht Schwyz, 24.6.03, KG 331/02 ZK, 24 Bull.ASA 115 (2006), where a Swiss cantonal court held that expert determination (*Schiedsgutachten*) is not subject to the arbitration rules.

¹²⁴¹ Indeed, the Commission in its Explanatory Brochure (*op.cit.*), under Question 70 and with regard to disputes on the termination of the car dealership, refers only to arbitration and litigation and excludes any role for third-party experts: “In the event of dispute, it will be for the arbitrator or national court to decide whether the reasons given justify the termination of the dealer agreement and, amongst other things, to choose an appropriate remedy if the reasons given do not justify the termination. In coming to a decision as to whether the reasons for termination are well-founded, the arbitrator or judge may have regard to a number of elements including the dealer agreement itself, the requirements of national contract law, as well as the text of the Regulation.” This is a step in the right direction but does not remedy the problem created by the alternative reference to experts and arbitrators in the text of the Regulation. Compare also the recent *Vulcan Silkeborg* ruling of the ECJ (*op.cit.*) where there are many references to arbitration as a real dispute resolution mechanism, in particular with regard to disputes concerning the termination of a car distribution agreement.

¹²⁴² See e.g. Du Jardin, *supra* (2005), p. 165.

¹²⁴³ See below the more detailed discussion of this problem in the context of merger control.

The real revolution in the whole relationship between arbitration and EC competition law can be seen in merger control, at first sight a rather unlikely area for a role for arbitration.¹²⁴⁴ Since 1992 the Commission has embraced arbitration as a credible procedural mechanism to resolve disputes related to commitments given by the merging parties to the Commission.¹²⁴⁵ In such cases, the Commission accepts a commitment¹²⁴⁶ by companies to submit disputes with third parties, or exceptionally disputes between the merging parties themselves, to independent arbitration and then may either (a) proceed to directly impose on them a condition or obligation to that effect in its clearance decision¹²⁴⁷ or (b) just clear the merger referring to the commitments but without transforming them into conditions or obligations. In the first of these two cases, the conditions or obligations intend to directly ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission.¹²⁴⁸ The legal consequences of a breach or non-fulfilment of obligations and conditions differ, although in the early stages of EC merger control the distinction was not very clear and the two instruments were used in an alternative way. Gradually, the distinctiveness of conditions and obligations has been clearly affirmed in the Commission decisional practice and more importantly in its Notice on Remedies.¹²⁴⁹ Conditions usually refer to measures contained in commitments that structurally change the market (structural remedies), whereas obligations refer to implementing measures that aim at fulfilling the commitments relevant to behavioural remedies. In case the undertakings concerned commit a breach of an *obligation* attached to the compatibility decision, the Commission, if the breach is serious, may revoke its decision.

¹²⁴⁴ Compare Idot, "Une innovation surprenante : L'introduction de l'arbitrage dans le contrôle communautaire des concentrations", (2000) Rev.Arb. 591.

¹²⁴⁵ Compare in this context Stoffregen, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), who makes an interesting distinction between substantive and procedural-technical commitments. Arbitration would belong to the latter.

¹²⁴⁶ We prefer the term "commitments" to the term "undertakings", which is also used interchangeably, in order to avoid confusion, since the latter term has become a technical term in EC competition law and refers to firms.

¹²⁴⁷ This possibility exists both for the first phase and for the second phase of the merger clearance procedure. See respectively Arts. 6(2)(b) and 8(2)(b) Reg. 139/2004. It is noteworthy that before the 1997 amendments of Reg. 4064/1989 there was no explicit power for the Commission to accept commitments offered by the parties and to attach conditions and obligations to its first phase decisions, but it had accepted such commitments in practice. On the enforceability of such commitments, see B.E. Hawk and H.L. Huser, *European Community Merger Control: A Practitioner's Guide* (The Hague/London/Boston, 1996), p. 325.

¹²⁴⁸ Conditions and obligations may also be used by the Commission, when the latter grants a derogation from the obligation to suspend putting into effect a merger under Article 7. See Art. 7(3) Reg. 139/2004.

¹²⁴⁹ *Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98*, OJ [2001] C 68/3.

This is applicable to both first and second phase decisions.¹²⁵⁰ Under the previous Merger Regulation, on the other hand, the Commission had the power to impose fines and periodic penalty payments only in case of a breach of obligation attached to a second phase decision.¹²⁵¹ Thus, in case of a breach of first phase obligations, the only possibility for the Commission was the rather radical step to revoke its decision.¹²⁵² The new Merger Regulation remedies this gap. Articles 14 and 15 of the Regulation, among the other very important amendments, provide for fines and periodic penalty payments also in cases of breach of first phase-imposed obligations.

If, on the other hand, the commitment has been transformed to a *condition* for the clearance of the merger, any breach of this condition means that the authorisation decision will no longer be valid, thus, the merger will be considered prohibited *ab initio*.¹²⁵³ Heavy fines under Article 14(2)(b) of the Regulation may also be imposed.¹²⁵⁴ Alternatively, the Commission may by decision require (a) the undertakings or assets brought together to be separated or (b) the cessation of joint control or (c) any other action appropriate in order to restore conditions of effective competition.¹²⁵⁵

As mentioned above, apart from formally integrating commitments in conditions or obligations, in certain cases the Commission refers in the grounds of its decision to commitments given by the parties without however making such commitments obligatory upon them.¹²⁵⁶ In such cases the commitment in question does not have the character of a condition or obligation and the Commission usually simply “takes notice” thereof. The

¹²⁵⁰ Respectively Arts. 6(3)(b) and 8(6)(b) Reg. 139/2004. In case of breach of an obligation attached to a first phase clearance decision the Commission may alternatively order the commencement of the second phase (Art. 6(4) Reg. 139/2004).

¹²⁵¹ Arts. 14(2)(a) and 15(2)(a) Reg. 4064/1989. A fine or a periodic penalty payment could - and still can - also be imposed in case of breach of an obligation imposed with a derogation from suspension decision of the Commission under Art. 7(3) Reg. 139/2004 (old Art. 7(4) Reg. 4064/1989).

¹²⁵² See D’Ormesson and Kerjean, “Le développement de la pratique des engagements en matière de contrôle communautaire des concentrations”, 34 RTDE 479 (1998), pp. 484-485.

¹²⁵³ See Stoffregen, *supra* (2003), pp. 1638-1639. According to Ritter, Braun and Rawlinson, *supra* (2000), p. 510, the condition has a suspensive effect. We respectfully think, however, that the condition, instead of being suspensive (precedent), may be resolutive (subsequent), if the facts of the case so require. For example this may be the case where the condition imposed refers to divestiture of assets that is expected to take a longer time period. Ultimately, this is a question of interpretation. See further Idot, “À propos des engagements en droit de la concurrence : Quelques réflexions sur la pratique communautaire et française”, 35 CDE 569 (1999), p. 607, who stresses that the question of the condition’s being suspensive or resolutive is merely theoretical.

¹²⁵⁴ If a condition is breached or not fulfilled and, as a result, the merger authorisation decision becomes void, then the prohibition of Art. 7(1) Reg. 139/2004 resurrects and the merged undertakings can be fined under Art. 14(2)(b) for having put into effect a concentration in breach of Art. 7(1).

¹²⁵⁵ Art. 8(4) Reg. 139/2004. Again, if the undertakings fail to comply with such measures they are subject to fines and periodic penalty payments under Arts. 14(2)(c) and 15(1)(d) respectively. For examples of decisions based on Art. 8(4) of the Merger Regulation, see Commission Decision 2004/103/EC of 30 January 2002 (M.2416-Tetra Laval/Sidel), OJ [2004] L 38/1; Commission Decision 2004/276/EC of 30 January 2002 (M.2283-Schneider/LeGrand), OJ [2004] L 101/134.

¹²⁵⁶ See D’Ormesson and Kerjean, *supra* (1998), p. 509 *et seq.*

question whether such a commitment has legal effects, in the sense that a breach of its terms can affect in some way the authorisation decision of the Commission, is not always obvious. The fact that such a commitment may not formally be the subject of a condition or obligation within the meaning of Articles 6 and 8 of the Merger Regulation may not be decisive. Commitments that are mentioned in the grounds of the authorisation decision may yet entail legal effects. Thus, according to the Court of First Instance, in order to determine whether such a commitment produces legal effects, “it is necessary to consider whether the declaration that the notified operation is compatible was affected by it in the sense that, in the event of breach of its terms, the Commission could revoke its decision”.¹²⁵⁷

Arbitration commitments given during the procedure (first or second phase) of a merger clearance are usually aimed at securing the enforcement of certain behavioural remedies and are mostly transformed by the Commission to obligations, rather than to conditions. While conditions are more suitable for commitments offering structural remedies that aim at eliminating the creation of a dominant position, which means that, in case of breach, the clearance decision will no longer stand, obligations are more appropriate for commitments offering behavioural remedies and for commitments that regard measures that belong to the sphere of influence of the merging parties, such as the appointment of trustees or “hold separate” obligations.¹²⁵⁸ In case of breach of the latter obligations, fines and the risk of revocation of the clearance are more efficient measures.

Recourse to arbitration on the one hand appeases the objections of the Commission by providing for a procedural framework which offers a remedy to competitors or other concerned persons worthy of protection, thus relieving the Commission of the burden to constantly monitor compliance and intervene in every single case of dispute, while on the other hand, because of its confidentiality and informality, it is accepted more willingly by the companies that are interested in getting their business arrangement through in a time-efficient way. Based on the Commission’s practice, we can see that arbitration has mostly been used in cases involving access to networks, important technologies, infrastructure, film and media content and other facilities that are deemed important for the entry of a third party to a specific market.

ii. Examples of Merger Clearance Decisions Referring to or Imposing Arbitration

¹²⁵⁷ Cases T-125/97 and T-127/97, *Coca-Cola, op.cit.*, para. 97.

¹²⁵⁸ See Stoffregen, *supra* (2003), p. 1639.

An exhaustive reference to and analysis of all cases where arbitration has been used as a procedural remedy in merger clearance decisions lies outside the scope of the current study.¹²⁵⁹ It is nevertheless interesting to refer to some important examples of these cases, in order to understand how arbitration is intended to function and to also note some problems that some of these cases raise.

We can in fact distinguish two periods in the Commission's decisional practice: The first period covers most of the 1990s and references to arbitration in that period are usually short and in some instances "awkward". During a second more recent period, clearance decisions refer to commitments which contain extensive, detailed and better-drafted provisions on arbitration.

The first case where arbitration was used as a procedural remedy refers to arbitration in a very short text: "Arbitration by mutually agreed independent experts will be provided in case of disputes relating to the application of the agreement".¹²⁶⁰ This first reference to arbitration also epitomises some of the problems associated with this first period. This has to do basically with the confusion of the Commission about the concept of arbitration, shown by the reference to the awkward term "arbitration by independent experts".¹²⁶¹ While some subsequent decisions avoid this confusion and have short references to "arbitration", "independent arbitration", "independent arbitrators" or "arbitration body",¹²⁶² some other decisions introduce a different problematic element, the involvement of DG-COMP or DG-IV, as it then was, in some of the arbitration-related questions, such as nomination and confirmation of arbitrators.¹²⁶³ Meanwhile, from 1997 and onwards, we see the first

¹²⁵⁹ See the more extensive reports by Blessing, *supra* (2003), p. 91 *et seq.*; Blanke, *supra* (2006), p. 203 *et seq.*

¹²⁶⁰ For the first such case, see Commission Decision of 4 September 1992 (M.235-Elf Aquitaine-Thyssen/Minol), OJ [1992] C 232/1, para. 13.

¹²⁶¹ See above on the same confusion in the context of Reg. 1400/2002.

¹²⁶² Compare Commission Decision of 30 September 1992 (M.214-Du Pont/ICI), OJ [1993] L 7/13, para. 48; Commission Decision of 21 June 1994 (M.430-Procter & Gamble/VP Schickedanz (II)), OJ [1994] L 354/32, para. 187, point 11; Commission Decision of 16 January 1996 (M.623-Kimberly-Clark/Scott), OJ [1996] L 183/1, para. 233, point 11; Commission Decision of 30 July 1997 (M.877-Boeing/McDonnell Douglas), OJ [1997] L 336/16, para. 117; Commission Decision of 27 May 1998 (M.993-Bertelsmann/Kirch/Premiere), OJ [1999] L 53/1, paras. 129-132, 139-140; Commission Decision of 27 May 1998 (M.1027-Deutsche Telekom/Beta Research), OJ [1999] L 53/31, paras. 58-60, 64; Commission Decision of 12 July 2000 (M.1813-Industri Kapital (Nordkem/Dyno)), OJ [2002] L 154/41, point 2 of the annexed commitments; Commission Decision of 8 May 2001 (M.2268-Pernod Picard/Diageo/Seagram Spirits), OJ [2002] C 16/13, para. 53 and points 6 and 7 of the annexed commitments; Commission Decision of 20 December 2001 (M.2530-Südzucker/Saint Louis Sucre), OJ [2003] L 103/1, point 13 of the annexed commitments; Commission Decision of 20 December 2001 (M.2533-BP/E.ON), OJ [2002] L 276/31, point 1 of Annex II; Commission Decision of 2 September 2003 (M.3099-Areva/Urenco/ETC JI), point 13 of Annex A.

¹²⁶³ See Commission Decision of 27 November 1992 (M.259-British Airways/TAT), OJ [1992] C 326/1, annexed commitments *in fine*; Commission Decision of 20 July 1995 (M.616-Swissair/Sabena (II)), OJ [1995] C 200/10, annexed commitments, point 4.5; Commission Decision of 1 December 1999 (M.1578-

references to arbitration institutions, such as the ICC and LCIA, and to institutional rules of arbitration, which denotes a better understanding of the nature and function of arbitration on the part of the Commission.¹²⁶⁴

An interesting early case is *Alcatel/Thomson CSF - SCS*,¹²⁶⁵ a phase I case. There, the Commission concluded that there were risks of vertical effects connected with the leading position of Thomson in the upstream market for the supply of travelling wave tubes for satellites, when combined with the proposed joint venture's significant share in the supply of complete satellites. The commitments by the parties to supply other satellite constructors with travelling wave tubes on non-discriminatory terms included a clause providing for automatic recourse to an independent arbitrator in the event of a dispute. This case has two particularities. First, for the first time an arbitration commitment contains detailed rules on such questions as the place of arbitration, the *lex arbitri*, the power of the arbitrator to order discovery and to take conservatory measures, and the timing of the award (fast-track arbitration). Second, the arbitration commitment designates *a priori* the arbitrator, in this case the *Directeur de l'Administration* of the European Space Agency or any other competent person in that organisation.¹²⁶⁶ Finally, there are detailed provisions on the merging parties' compliance with the eventual arbitral awards and on notification to the Commission of the initiation of the arbitration proceedings and of the arbitral awards themselves. Presumably, the requirement to notify the Commission of the initiation of the proceedings, is aimed at allowing the Commission to directly or indirectly intervene in the arbitration.

Sanitex/Sphinx), OJ [2000] L 294/1, para. 252, point 20; Commission Decision of 1 December 1999 (M.1601-*Allied Signal/Honeywell*), OJ [2001] L 152/1, point 32 of the annexed commitments.

¹²⁶⁴ Compare Commission Decision of 15 October 1997 (M.938-*Guinness/Grand Metropolitan*), OJ [1998] L 288/24, para. 183(i) (reference to the LCIA Rules with also a reference to the applicable law: "arbitration under the Rules of the London Court of International Arbitration applying the law of England and Wales"); Commission Decision of 12 April 2000 (M.1795-*Vodafone Airtouch/Mannesmann*), OJ [2000] C 141/19, point 25 of the annexed commitments (reference to the LCIA Rules); Commission Decision of 3 May 2000 (M.1671-*Dow Chemical/Union Carbide*), OJ [2001] C 256/3, point 28 of the annexed commitments (reference to the Rules of Arbitration of the Netherlands Arbitration Institute); Commission Decision of 8 May 2000 (M.1846-*Glaxo Wellcome/Smithkline Beecham*), OJ [2000] C 170/6, point 64 of the annexed commitments (reference to the LCIA Rules); Commission Decision of 13 October 2000 (M.2050-*Vivendi/Canal+/Seagram*), OJ [2000] C 311/3, para. 78 and annexed commitments (reference to the ICC Rules); Commission Decision of 20 December 2001 (M.2389-*Shell/DEA*), OJ [2003] L 15/35, Art. 16 of the annexed commitments (reference to the ICC Rules); Commission Decision of 30 April 2003 (M.2876-*Newscorp/Telepiù*), paras. 225(l) and 259, and section 15.1.b of the annexed commitments (reference to the ICC Rules).

¹²⁶⁵ Commission Decision of 4 June 1998 (M.1185-*Alcatel/Thomson CSF - SCS*), OJ [1998] C 272/5, paras. 38, 40-41 and annexed commitments.

¹²⁶⁶ For two other similar cases where again the arbitrator is proposed to be associated with the European Space Agency, see Commission Decision of 28 April 1999 (M.1309-*Alatra/Aérospatiale*), OJ [1999] C 133/5, para. 76 and annexed commitment; Commission Decision of 28 April 2005 (M.3680-*Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio*), para. 118 and detailed annexed commitments.

Thereafter, increasingly the Commission clearance decisions refer to arbitration commitments containing rather detailed rules on many arbitration-related matters, including the grant to the arbitrators of broad powers of discovery and compulsion.¹²⁶⁷ Among the novelties introduced is also the reversal in some cases of the burden of proof for the benefit of third parties¹²⁶⁸ and, exceptionally, the power of the Commission to approve the “arbitral process” or even to lay it down itself.¹²⁶⁹ Another novelty for orthodox arbitration procedure is the provision for a form of “pendulum arbitration” in the *Shell/BASF/JV-Project Nicole* clearance decision.¹²⁷⁰ In that case, the licensor undertook to submit all eventual disputes with third interested parties to a specific arbitration process, whereby each party submits a single proposal for the consideration for such a licence to the arbitration panel which can only decide in favour of one of the two submitted proposals in its entirety. This can be explained as a result of the Commission’s concern to ensure that the commitments are enforced in the shortest possible period.¹²⁷¹

Some more recent cases are even more interesting. Thus, the *Newscorp/Telepiù* Decision raises novel issues and brings together arbitration with regulation for the first time.¹²⁷² The case has been characterised as a paradigm for the integration between regulation and competition policy in both substance and procedure.¹²⁷³ It concerned the acquisition by News

¹²⁶⁷ Commission Decision of 9 March 1999 (M.1313-*Danish Crown/Vestjyske Slagterier*), OJ [2000] L 20/1, paras. 212-213, 223; *Allied Signal/Honeywell* Decision, *op.cit.*, para. 128 and points 27 and 32 of the annexed commitments; Commission Decision of 25 January 2000 (M.1684-*Carrefour/Promodes*), Annex 2; Commission Decision of 8 January 2002 (M.2621-*SEB/MOULINEA*), OJ [2002] C 49/18, para. 148, point 1(f) of the annexed commitments.

¹²⁶⁸ *Vodafone Airtouch/Mannesmann* Decision, *op.cit.*, point 25 of the annexed commitments; Commission Decision of 21 March 2000 (JV.37-*BSkyB/Kirch Pay TV*), OJ [2000] C 110/45, annexed commitments; *Vivendi/Canal+/Seagram* Decision, *op.cit.*, annexed commitments; *Shell/DEA* Decision, *op.cit.*, Art. 16 of the annexed commitments; Commission Decision of 10 July 2002 (M.2803-*Telia/Sonera*), OJ [2002] C 201/19, paras. 119, 136, 143 and section F(c) of the annexed commitments; *Newscorp/Telepiù* Decision, *op.cit.*, section 15.1.b of the annexed commitments.

¹²⁶⁹ *BSkyB/Kirch Pay TV* Decision, *op.cit.*, annexed commitments: “The parties will propose an arbitration process to the Commission within two weeks of the Decision. The arbitration process shall comprise the process to be used and the appointment of the Arbitrator(s). The Commission shall decide within one month whether they approve the proposed arbitral process. If the Commission does not approve the arbitral process, the parties shall have a further fourteen days to propose alternatives and the Commission a further month to give its final approval. If the Commission does not approve any process proposed by the parties it may lay down the arbitral process itself.” It is unclear which legal basis in Reg. 139/2004 the Commission would use to lay down, presumably by decision, the arbitral process.

¹²⁷⁰ Commission Decision of 29 March 2000 (M.1751-*Shell/BASF/JV-Project Nicole*), OJ [2000] C 142/35, point 2.B.3 of the annexed commitments.

¹²⁷¹ See Stoffregen, *supra* (2003), pp. 1656-1657. For other “pendulum arbitration” cases, see *Dow Chemical/Union Carbide* Decision, *op.cit.*, paras. 112, 186 and points 28 and 36 of the annexed commitments; Commission Decision of 13 January 2003 (M.2416-*Tetra Laval/Sidel*), para. 120, section C of the annexed commitments and point (xiv) of the annexed “Licence Tetra Fast” Term Sheet.

¹²⁷² Cited *supra*.

¹²⁷³ See Bavasso, “Electronic Communications: A New Paradigm for European Regulation”, 41 CMLRev. 87 (2004), p. 115. The examination of the substance of that case is outside the scope of the current study.

Corporation of sole control of Telepiù and a subsequent merger of Telepiù with Stream, the pay-TV platform controlled by News Corporation. The Commission concluded that the concentration would have led to the creation of a lasting near-monopoly in the Italian pay-TV market, would have raised barriers to entry in satellite pay-TV and would have created a monopoly position in Italy as regards the acquisition of some types of premium programme content.¹²⁷⁴ This would have foreclosed third-party access to premium content. The merger, however, was cleared, after a package of substantial remedies was offered to the Commission. A novelty of the case was the involvement of a national regulatory authority, the Italian Communications Authority, whose task would be to deal with eventual disputes with third parties concerning the above-mentioned wholesale offer, access to the platform and any other question pertaining to consumer protection.¹²⁷⁵ The arbitration mechanism is intended to complement the “resolution of disputes” by the Italian authority, by dealing with those disputes that may arise regarding the implementation of the commitments and that are not suitable for the regulatory authority.¹²⁷⁶

In *Daimler Chrysler/Deutsche Telekom/JV*,¹²⁷⁷ the Commission authorised the acquisition of joint control by DaimlerChrysler AG and Deutsche Telekom AG of the newly created joint venture Toll Collect.¹²⁷⁸ Toll Collect would establish and operate a system for the collection of road tolls from heavy trucks in Germany. It could also be used as a platform to provide telematics services. The Commission was concerned that the formation of the joint venture would lead to a dominant position of DaimlerChrysler in the emerging market for telematics systems for transport and logistics businesses in Germany. In response to the Commission’s competition concerns, the parties undertook to form an independent telematics gateway company and develop a GPS interface for the Toll Collect onboard unit in order to connect it with third-party peripherals and for a toll collection module to be integrated into third-party

¹²⁷⁴ In particular, the exclusive rights to certain football matches, which take place every year and in which national teams participate, and blockbuster movies.

¹²⁷⁵ On the Art. 10 EC-based principle of co-operation between the Commission and the national regulatory authority in this case, see Bavasso, *supra* (2004), p. 116.

¹²⁷⁶ The grouping together of the proceedings before the Italian authority and of the arbitration proceedings under the title “Dispute Resolution” is inelegant, to say the least. In reality the regulatory authority in question does not decide civil disputes, in the same way as arbitrators do, but merely applies competition and regulatory law. For another unfortunate reference in that Decision, see para. 225(1): “Newscorp has proposed an arbitration procedure in order to guarantee the effectiveness of the commitments. *This arbitration system includes inter alia* the jurisdiction of [the Italian Communications Authority] for the matters within its competence under Italian [sic], including the wholesale offer” (emphasis added). Presumably, the Italian authority would not agree with its qualification as “arbitration”.

¹²⁷⁷ Commission Decision of 30 April 2003 (M.2903-*Daimler Chrysler/Deutsche Telekom/JV*), OJ [2003] L 300/62, section V of the annexed commitments.

¹²⁷⁸ Commission Decision 2003/792/EC of 30 April 2003 in Case COMP/M.2903-*Daimler Chrysler/Deutsche Telekom/JV*, OJ [2003] L 300/62 (the commitments are reported only in the German text).

telematics devices. The commitments also provide for an arbitration mechanism where third parties can submit their disputes with the parties as well as with Toll Collect. In the second case, this mechanism is interesting because the parties are not intended to take part in the possible arbitration themselves, but are rather under a duty vis-à-vis the Commission to obligate Toll Collect to submit to arbitration with third parties. The arbitration would be conducted in Berlin under the Rules of the *Deutsche Institution für Schiedsgerichtsbarkeit* (DIS). The offerors of the commitments are obliged to agree to the arbitration request within very tight time limits. Finally, the European Commission (to be more precise, the then Merger Task Force) must be promptly informed of the submission of a related dispute to arbitration.

Another interesting case is *Alcan/Pechiney II*, where the parties offered a series of commitments in order to respond to the Commission's concerns *inter alia* with regard to two specific markets (alumina refining technology and aluminium smelter cell technology). In their commitment to license the related technologies on terms and conditions comparable to those applied prior to the transaction, the parties included a detailed arbitration scheme that would be put in effect in case of a dispute as to the terms of a licence.¹²⁷⁹ The arbitration would be conducted in London under the ICC Rules. It can also be categorised as one of the "pendulum arbitration" cases whereby each third party submits a single proposal for the terms of the licence to the arbitrators, who should select within a specified time period one of the two submitted proposals in its entirety. The third party seeking a licence should only provide *prima facie* evidence that the terms and conditions proposed are not in accordance with the commitments' requirements. In other words, the burden of proof is reversed. There is then a provision that if the third party seeking a licence does not enter into a licence pursuant to the terms set by the arbitral award within a time period, the addressee of the Commission Decision may request the Commission to relieve it of its obligations under the commitments.

This case is also interesting because of the rather rare involvement of the "licensing trustee". Thus, the party wishing to initiate arbitration proceedings must communicate this to the trustee, who has the overall competence to monitor the compliance of the offeror of the commitments. In particular, the licensing trustee must be informed of any arbitration proceedings commenced and of their outcome. The trustee, as well as the Commission, must

¹²⁷⁹ Commission Decision of 29 September 2003 (M.3225-*Alcan/Pechiney (II)*), sections 1.3.3 to 1.3.5 of the annexed commitments.

also be furnished without delay with the copies of any arbitral awards made pursuant to the arbitration mechanism.¹²⁸⁰

Going on with our analysis of some exemplary cases, in *Johnson & Johnson/Guidant*, a Phase II case, the Commission approved the acquisition by the US healthcare group Johnson & Johnson (“J&J”) of its competitor Guidant, a US company specialised in cardiovascular medical products, subject to conditions. J&J and Guidant were direct competitors in respect of a number of products and the Commission opened an in-depth market investigation because it had serious concerns about the proposed transaction. In particular with regard to endovascular stents and accessories used in peripheral arteries, the Commission found that the merger would give rise to competition concerns in the EEA, given that both J&J and Guidant were among the leading suppliers in Europe, the market was very concentrated, and there were high entry barriers. To respond to these concerns, the parties offered commitments to the Commission, proposing to divest the entire operations (products, logistics, inventory, customer list, sales force, brand names, and intellectual property) of Guidant in the EEA. The parties also offered to the purchaser an interim original equipment manufacturer supply agreement followed by either the continuation of such agreement or the full assistance to replicate the US production facility in Europe. It is in the context of that agreement with the prospective purchaser that the commitments include a “fast track resolution procedure”, in case of disputes arising between J&J and the purchaser regarding the implementation of any term of the technical assistance agreement or the supply arrangement.

The resolution mechanism is typical of those cases where we are really in the margins between arbitration and individual expertise.¹²⁸¹ While it is intended to function as a method to resolve a rather technical question, the words “arbitration” and “arbitrators” are used and in fact there is even an express provision that if the party-appointed arbitrators cannot agree on the nomination of a third arbitrator, they shall request the London Court of International Arbitration (LCIA) to appoint the third arbitrator. Again, there is also an express rule that the arbitrators will have wide fact-finding powers and that the burden of proof will be reversed

¹²⁸⁰ With regard to the role of the trustee, we must note an unfortunate text in the commitments that he “shall arbitrate” certain disputes subject to the Commission’s review (*op.cit.*, para. 8 in section 1.3.4). This is unconnected with the arbitration mechanism but such language must be avoided because it confuses arbitration as a dispute resolution mechanism with third party expertise, which in such cases essentially facilitates the Commission’s monitoring role. For another interesting case, where the role of the trustee is intermingled with the role of the arbitrators, see Commission Decision of 30 March 2005 (M.3686-*Honeywell/Novar*), points 14, 23, and 46(f) of the annexed commitments, point 5(e) of Schedule II (“Trademark License”), and point 2(h) of Schedule III (“Technology Transfer Commitment”). In this case, the arbitrators will resolve disputes *inter alia* between one of the merging parties and a third party-licensee, on the one hand, and the Monitoring Trustee, on the other hand (*op.cit.*, points 14 and 46(f) of the annexed commitments and point 5(e) of Schedule II).

¹²⁸¹ *Johnson & Johnson/Guidant* Decision, *op.cit.*, section F of the annexed commitments.

for the benefit of the party initiating the arbitration process, who must only produce evidence of a *prima facie* case. It is also provided that the arbitration procedure shall follow the LCIA Rules and shall be conducted in London.

Interestingly, in the event of disagreement between the parties as to the interpretation of the commitments, the arbitrators must inform the Commission and may seek the Commission's interpretation of the commitments before finding in favour of any party to the arbitration. The Commission may, at any time, make submissions during the arbitration procedure. There are finally provisions on costs, which will be borne by the prevailing party, on the award's finality and on reporting duties for the parties vis-à-vis the Commission.

These Decisions show an increased refinement of the arbitration-related rules contained in the commitments. Indeed, it is even possible to read through them the shaping of a kind of implicit "Arbitration Mandate", referring to issues like the scope of the arbitration mechanism, the modalities of seizing the arbitrators, possible duties to use best endeavours to find a solution through conciliation, the applicable law and the *lex arbitri*, the language and site of the arbitration, the composition of the arbitration tribunal, the procedure followed, the burden of proof, the power of the arbitrators to order discovery and conservatory measures, and possibly the monitoring role of the Commission, which in some cases has powers to intervene in the proceedings.¹²⁸²

iii. Spill-over to the National Level

The use of arbitration commitments in merger clearance decisions is not met only at the EU level but also nationally. Indeed, one could even speak of a spill-over effect. Thus, there are recent cases where national competition authorities have accepted commitments that included arbitration mechanisms. These commitments were then integrated into the clearance decision.

¹²⁸² See in particular Commission Decision of 2 September 2003 (M.3083-GE/*Instrumentarium*), para. 355 and Annex I to the annexed commitments; Commission Decision of 11 February 2004 (M.3280-*Air France/KLM*), para. 167 and section 12 of the annexed commitments (providing for the possibility for the Commission to make *amicus curiae* submissions before the arbitration tribunal); Commission Decision of 22 November 2004 (M.3570-*Piaggio/Aprilia*), para. 68 and Annex 1 (again providing for the possibility for the Commission to make *amicus curiae* submissions before the arbitration tribunal); *Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio* Decision, *op.cit.*, para. 118 and detailed annexed commitments (providing a glossary of terms and referring to the concept of "arbitrator" as "a natural or legal person, independent from the Parties, having the required experience, expertise and independence, who is approved by the Commission and who is in charge of the enforcement of the Arbitration Commitment" (emphasis added)); Commission Decision of 4 July 2005 (M.3770-*Lufthansa/Swiss*), section 13 of the annexed commitments (again providing for the possibility for the Commission to make *amicus curiae* submissions before the arbitration tribunal); Commission Decision of 22 December 2005 (M.3940-*Lufthansa/Eurowings*), section 12 (again providing for the possibility for the Commission to make *amicus curiae* submissions before the arbitration tribunal).

One such case is *Sogecable* in Spain. There, the Spanish cabinet approved the acquisition by Sogecable of its sole direct-to-home (DTH) pay-TV competitor in Spain, Vía Digital of Telefónica.¹²⁸³ The merger had initially been notified to the European Commission, but was referred back to the Spanish authorities under Article 9(3)(b) of the previous Merger Regulation.¹²⁸⁴ The Spanish authorisation Decision was subject to certain conditions that were further specified in a detailed implementation plan that was subsequently submitted to the national authorities by the acquiring party.¹²⁸⁵ The conditions basically guarantee third parties' equitable, transparent and non-discriminatory access to broadcasting rights. Such competitors would also be free to set their own pay-per-view prices. Other conditions contained limitations regarding the duration and scope of exclusivity rights. It is noteworthy that the arbitration mechanism constitutes one of the conditions (*condiciones*) of the authorisation. In more detail, the Decision states that the implementation plan that was to be submitted to the *Servicio de defensa de la competencia* should "include a private arbitration mechanism" that Sogecable "must offer to any third party" for the resolution of disputes arising out of the implementation of certain conditions, notably those on access to broadcasting rights. It further stipulates that Sogecable must furnish to the arbitrators all necessary information for the correct performance of their function in conditions of confidentiality with regard of business secrets.¹²⁸⁶

Another jurisdiction where there are some signs that arbitration may have found some favour in the context of merger control is the UK.¹²⁸⁷ The OFT has accepted commitments including an arbitration or adjudication mechanism on at least one occasion, although it is not entirely

¹²⁸³ Decision of the Council of Ministers of 29 November 2002, available in Spanish in: http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N-280_1_ACM.htm. The Decision was based on an Advisory Report of the *Tribunal de defensa de la competencia* of 13 November 2002. For a description of the substance of this case, see Ariño, "Digital War and Peace: Regulation and Competition in European Digital Broadcasting", 10 EPL 135 (2004), p. 146 *et seq.*

¹²⁸⁴ Commission Decision of 14 August 2002 (M.2845-Sogecable/Canalsatélite Digital/Via Digital). See also Commission Press Release IP/02/1216 of 16 August 2002. The Spanish government had requested the referral of the case to the national authorities based on Art. 9(2)(a) of the previous Merger Regulation. The Commission referral Decision was appealed by third parties to the CFI, but the appeal was rejected. See Cases T-346/02 and T-347/02, *Cableuropa SA et al. v. Commission*, [2003] ECR II-4251. This judgment lays down important principles on the Commission's discretion to refer merger cases back to NCAs (para. 174 *et seq.*).

¹²⁸⁵ Commission Press Release IP/03/655 of 8 May 2003. The submission of the implementation plan was itself a condition of the authorisation (point 20 of the Spanish Decision).

¹²⁸⁶ Point 21 of the Decision. It appears, however, that the arbitration mechanism that was put in effect was closely associated with the Spanish Communications Authority. The mechanism was also actually used but it is reported to have been complicated and to have produced mixed results.

¹²⁸⁷ Under the UK system of merger control, competences are divided between the OFT, the Competition Commission and in some rare cases the Secretary of State for Trade and Industry. If the OFT finds that a merger could have adverse effects for competition, it refers it to the Competition Commission. It is in this context that the OFT may accept "undertakings in lieu of reference", i.e. commitments that are intended to remedy those adverse effects, as an alternative to reference.

clear that the specific mechanism can be considered as arbitration.¹²⁸⁸ It is interesting to note that the OFT is far more nuanced than the European Commission in the qualification of such mechanisms as “arbitration”.¹²⁸⁹ Thus, it has usually accepted commitments that provide explicitly not for arbitration, but rather for “expert determination”, “valuation” or “monitoring” by independent third parties.¹²⁹⁰ Such mechanisms, in the view of the OFT, do not amount to a delegation of powers to third parties, since statutory duties cannot be delegated, but provide useful assistance to the regulators, thus offering technical expertise when this is necessary and at the same time saving administrative resources.

dd. Arbitration in Article 81(3) EC Individual Exemption Decisions

Apart from merger clearance decisions, arbitration has also been used to as a procedural mechanism to resolve disputes with third parties in some Article 81(3) EC individual exemption decisions. Such decisions are no longer possible under the new enforcement system of legal exception, yet it is interesting to refer to these cases, not only because some exemption decisions are currently still in effect until their expiry, but also in order to analyse another instance of favour for arbitration on the part of the European Commission.

In this context, firms would give commitments in order to secure an exemption under Article 81(3) EC. The Commission could transform compliance with a commitment into a condition or obligation attached to the Article 81(3) EC exemption decision pursuant to Article 8(1) of Regulation 17/1962. Conditions and obligations, however, could not be attached to Article 81(1) EC negative clearance decisions.¹²⁹¹ Indeed, the very essence of conditions or obligations meant that the Commission recognised that there was already a competition problem, thus, that Article 81(1) EC applied, but that this problem could be adequately

¹²⁸⁸ See the Undertakings given on 27 October 2003 to the Secretary of State for Trade and Industry in *Carlton/Granada*, where reference is made to an “adjudication” mechanism which is closely associated with Ofcom, the national communications authority.

¹²⁸⁹ For an overview see the presentation given and the cases cited by the Director of the OFT Mergers Branch, Simon Priddis, “Enforcing Behavioural Remedies through Arbitration – Is it still Arbitration?: OFT Perspective”, IBC Conference on Alternative Dispute Resolution and Competition (1 March 2005, London).

¹²⁹⁰ See *Morrison Safeway* Decision of 26 September 2003 (reference to expert valuation), Undertakings given on 29 October 1999 to the Secretary of State for Trade and Industry in *IMS Health/PMS* (reference to third-party expertise); *Centrica/Dynegy* Decision of 7 March 2003 (reference to expert determination but with some adjudicatory elements; expert was to be appointed by the Law Society in case of no agreement between the parties).

¹²⁹¹ Art. 2 Reg. 17/1962.

remedied through the imposition of these conditions and obligations attached to an exemption decision.¹²⁹²

It should be pointed out at the outset that there is a difference between conditions and obligations attached to merger authorisation decisions and those attached to the old individual exemptions. In the former case only commitments that have been given by the notifying parties to the Commission can be transformed into conditions or obligations,¹²⁹³ whereas in the latter case the Commission could attach such conditions or obligations to the exemption decision, even *ex officio*, i.e. even if the applicant had not offered a commitment to that effect.¹²⁹⁴ The Commission had wide discretionary powers in imposing these conditions or obligations, subject to the procedural requirement of the parties' being heard¹²⁹⁵ and to the principle of proportionality.¹²⁹⁶

Conditions were usually imposed by an exemption decision in order to ensure that parties abandon the anti-competitive clauses and in order to ensure that effective competition is restored. Obligations, on the other hand, could require certain conduct of secondary importance on behalf of the parties and could impose certain reporting duties. The breach of a condition had different consequences from the breach of an obligation.¹²⁹⁷ A non-fulfilled condition meant that the agreement was no longer considered as exempted. Therefore, the agreement would be incompatible with Article 81(1) EC and would fall under the nullity of

¹²⁹² See, however, below on less formal possibilities.

¹²⁹³ See E. Navarro Varona, A. Font Galarza, J. Folguera Crespo and J. Briones Alonso, *Merger Control in the European Union, Law, Economics and Practice* (Oxford, 2005), p. 341; A. Lindsay, *The EC Merger Regulation: Substantive Issues* (London, 2003), paras. 9-02, 9-30. It is noteworthy that the Commission in para. 221 of its *Green Paper on the Review of Council Regulation (EEC) 4064/89*, COM(2001) 745/6 final, had considered whether it would be more appropriate for itself to enjoy a more active role in identifying the prospective remedies, yet there was no follow-up on this point.

¹²⁹⁴ See Faull, "The Enforcement of Competition Policy in the European Community: A Mature System", in: Hawk (Ed.), *EC and US Competition Policy 1991, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1992), p. 145. It is not easy to ascertain whether a condition to arbitrate disputes contained in an individual exemption decision has or has not been earlier offered by the addressees of the decision in the form of a commitment. Indeed, in the latter case, such imposed arbitration would give rise to serious human rights concerns, since it would deprive the undertaking concerned of its natural judge. It might also infringe the principle of proportionality, by which the Commission is bound. See also below on the impossibility of infringement decisions to impose recourse to arbitration.

¹²⁹⁵ In *Transocean*, *op.cit.*, para. 16, the ECJ stressed that "since Article [81(3)] constitutes, for the benefit of undertakings, an exception to the general prohibition contained in Article [81(1)], the Commission must be in a position at any moment to check whether the conditions justifying the exemption are still present. Accordingly, in relation to the detailed rules to which it may subject the exemption, the Commission enjoys a large measure of discretion". However, the Court went on to say that "an undertaking [must] be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions [that] impose considerable obligations having far-reaching effects" (para. 15).

¹²⁹⁶ See Ritter, Braun and Rawlinson, *supra* (2000), p. 130.

¹²⁹⁷ It is true, however, that especially in the past the terms "condition" and "obligation" have been used in a rather indiscriminate manner by the Commission. See Kerse, *supra* (1998), p. 252.

Article 81(2) EC.¹²⁹⁸ The breach of an obligation, on the other hand, did not affect the validity of the exemption, though an undertaking that intentionally or negligently committed such a breach was subject to fines according to Article 15(2)(b) of the old Regulation 17/1962. In addition, the breach of an obligation could be sufficient grounds for the Commission to revoke or amend the exemption given (Article 8(3)(b) of Regulation 17).¹²⁹⁹ One of the few individual exemption decisions where recourse to arbitration was imposed as a remedy is *UIP*. In that case, the Commission granted an exemption to a joint sales organisation agreement of US distributors of films that achieved substantial cost savings, while the latter undertook to set up an arbitration system for unsatisfied dealers and submit to arbitration any disputes concerning product allocation. According to the Commission arbitration was a practical means of solving problems common to the cinema industry, such as allocation of films and access to the exhibitors' screens. Arbitration was seen as particularly beneficial to small independent exhibitors.¹³⁰⁰ The specific arbitration commitment that was annexed to the Commission's Decision contained detailed provisions on the applicable law, language, timing and place of arbitration. There was a reference to the ICC Rules and, interestingly, it was provided that 'to the extent permitted by national law, an application to the competent judicial authority for preservation or interim measures shall not be incompatible with the arbitration agreement and shall not imply a renunciation of the agreement'.

Arbitration was also used in *Atlas*.¹³⁰¹ In that case, the Commission authorised the *Atlas* project, a joint venture between Deutsche Telekom and France Télécom aimed at providing telecommunications services to large users in Europe. The two parties had large market shares in Germany and France, buttressed by a legal monopoly over the supply of infrastructure. In addition, the *Atlas* project initially provided for the elimination of a competitor of Deutsche Telekom in Germany, namely France Télécom's local subsidiary,

¹²⁹⁸ A question arises as to the starting point of the incompatibility and of the resulting nullity. This depends on the condition's being suspensive or resolutive (i.e. precedent or subsequent, to use the English legal terminology). In the former case there has been no exemption, unless and before the condition is fulfilled, so there was never immunity from the nullity sanction or from other civil claims before the fulfillment of the suspensive condition (we assume that the agreement was a "new" one in the sense of Reg. 17/1962). In the latter case the agreement would be immune from the nullity and from other civil claims for the period between the notification and the fulfillment of the resolutive condition.

¹²⁹⁹ It should be accepted, however, that the situation arising from the breach of the obligation had to be serious enough in order for the Commission to be able to proceed to the more radical measure of the revocation of the exemption. Particularly so, since the Commission had in its disposal the less onerous measure to threaten and impose fines. See in this respect Kerse, *supra* (1998), p. 260.

¹³⁰⁰ Commission Decision 89/467/EEC of 12 July 1989 (*UIP*), OJ [1989] L 226/25. See further Toft, "Commission Renews the Exemption of United International Pictures BV", (1999-3) *EC Competition Policy Newsletter* 26.

¹³⁰¹ Commission Decision 96/546/EC of 17 July 1996 (*Atlas*), OJ [1996] L 239/23.

Info AG. The Commission made its authorisation conditional *inter alia* on France Télécom's agreeing to sell Info AG. Any dispute between France Télécom and the purchaser of Info AG with respect to France Télécom's commitment to divest of the Info AG business was to be subject to "arbitration by an independent third party". Another case is *British Interactive Broadcasting/Open*, where the Commission dealt with a co-operative joint-venture agreement that would develop digital interactive television services in the United Kingdom. The exemption given was subject to numerous conditions, one of them being that the new company would procure an "appropriate and independent arbitration procedure" that would be made available to third parties in respect of certain clearly defined disputes.¹³⁰²

A more interesting case is *Eurovision*. In the first *Eurovision* Decision of 1993¹³⁰³ the Commission granted an exemption to the Statutes of the European Broadcasting Union (EBU) and to some other regulations concerning the acquisition of television rights to sports events, the exchange of sports programmes within the framework of Eurovision¹³⁰⁴ and contractual access to such programmes for third parties. Under the revised access scheme for non-members that EBU submitted to the Commission, non-EBU member broadcasters would be granted non-discriminatory extensive access to Eurovision sports programmes, while the terms and conditions of such access would be freely negotiated between EBU members and these third parties. With regard to the access fee, according to the access scheme submitted to and approved by the Commission, if all other conditions of access have been agreed, at the request of the third party the matter would be submitted to "arbitration by independent expert(s)". The expert or experts would be nominated jointly by the parties or, failing agreement, either by the president of the locally competent national court of appeal, in case of national arbitration concerning access for national channels, or by the president of the ICC, in case of international arbitration concerning access for pan-European channels. The arbitral award would fix the access fee and would be final and binding.¹³⁰⁵

ee. Arbitration in Informal Settlements in Article 81 and 82 EC Cases

¹³⁰² Commission Decision 99/781/EC of 15 September 1999 (*British Interactive Broadcasting/Open*), OJ [1999] L 312/1.

¹³⁰³ Commission Decision 93/403/EEC of 11 June 1993 (*EBU/Eurovision System*), OJ [1993] L 179/23.

¹³⁰⁴ Eurovision is a European network, through which all active members of the EBU are eligible to participate in an institutionalised exchange system for television - including sports - programmes. EBU members are also eligible to participate in a system of joint acquisition of television rights to international sports events (Eurovision rights).

¹³⁰⁵ Para. 40 of the *EBU/Eurovision System* Decision. The actual wording of the access scheme including the arbitration mechanism was not attached to the 1993 Decision. The exemption was renewed with the 2000 *Eurovision* Decision, *op.cit.*, which itself included the detailed arbitration package at section 5 of Annex I.

Apart from the case of commitments that have been integrated in conditions or obligations in Article 81(3) EC exemption decisions, the Commission has also accepted in the past, in a informal way, commitments, not only in Article 81(3), but also in 81(1) EC and 82 EC cases.¹³⁰⁶ With regard to Article 81(1) and 82 EC cases, while it is true that the Commission could not under the previous enforcement system include conditions or obligations referring to commitments in negative clearance decisions, one could not exclude that the undertaking under investigation offered some kind of comprehensive commitment that withdrew the conduct in question from the ambit of Article 81(1) or 82 EC.¹³⁰⁷ In such cases, this commitment would not be integrated in a decision, but the Commission could take this into account in closing the file of the case or in granting a negative clearance.¹³⁰⁸

We deal here in essence with informal settlements, which usually take the form of a "unilateral" commitment, offered by a company "without prejudice".¹³⁰⁹ Such commitments are not enforceable both in the Community administrative law sense (i.e. they did not bind the undertakings as against the Commission and are not enforceable with fines) and in the private law sense (i.e. they do not create rights as against third parties). The Commission, however, could reopen proceedings and adopt a formal decision, if such commitments were breached or not honoured.

Interestingly, some of these unilateral commitments, which are rarely publicised, have contained references to arbitration. In those cases, the promise to have recourse to arbitration has been included in the commitments given to the Commission in order to meet the latter's concerns as to the application of Articles 81 or 82 EC.

¹³⁰⁶ See e.g. the commitments offered by The Coca-Cola Export Corporation in Commission Press Release IP/90/7, by Microsoft in Commission Press Release IP/94/653, by AC Nielsen in Commission Press Release IP/96/1117, by Digital Equipment Corporation in Commission Press Release IP/97/868, by SWIFT in Commission Press Release IP/97/870, and by Check Point Software Technologies Ltd. in Commission Press Release IP/02/521.

¹³⁰⁷ It should be added that the Commission has also accepted commitments in the past, in order to reduce the fines imposed upon undertakings for the breach of the competition rules. Reference is made to the *Wood pulp* Decision, *op.cit.*, para. 249 and annexed commitments. See further Idot, *supra* (1999a), pp. 572-573.

¹³⁰⁸ As pointed out by Idot, *supra* (1999a), p. 581, under Art. 3 Reg. 17/1962 the Commission had discretion to order the undertakings to bring their infringement of Art. 81 or 82 EC to an end. This gave it the possibility to negotiate settlements with the latter and to informally accept commitments that would remedy the breach of the Treaty competition rules.

¹³⁰⁹ Such a "unilateral" commitment was offered by IBM in its 1980s long-standing proceeding before the Commission. See further Van Bael, "The Antitrust Settlement Practice of the EC Commission", 23 CMLRev. 61 (1986), p. 70 *et seq.*; Lomholt, "The 1984 IBM Undertaking: Commission's Monitoring and Practical Effects", (1998-3) *EC Competition Policy Newsletter* 7. However, in practice it may, indeed, be the Commission that initially "proposes" remedies to the undertakings, which they may accept and then officially propose anew to the Commission as commitments. This seems to have been the case in the *IBM* case, where the Commission sent IBM a statement of necessary remedies.

Thus, in 1995 the Commission decided to approve Sony's pan-European dealership agreement after receiving certain commitments by that company. The initially notified selective distribution system could not be cleared under Article 81 EC. However, Sony agreed, following discussions with the Commission, to introduce some changes to its distribution system, as a result of which the Commission issued a negative clearance comfort letter. The first modification was to maintain the authorised wholesaler network in the distribution system. In order also to secure parallel trade, an additional protection was provided for all authorised dealers, wholesalers and retailers, to which Sony could no longer refuse to supply the contract products without written justification. Interestingly, Sony also accepted the possibility of appeal for a dealer who was refused authorisation through "the introduction of an arbitration procedure".¹³¹⁰

In 1999 the Commission gave a comfort letter to Ecomet, a grouping of European national meteorological institutes set up for the joint sale of meteorological products, after reaching a settlement on some specific points of the joint sale arrangements. In particular, the Commission ensured that the Ecomet rules guaranteed equal treatment of and fair competition with independent service providers. To that end, an arbitration procedure was introduced for settling disputes between independent service providers and Ecomet members on any matter falling within the scope of the notified rules.¹³¹¹

Another case is *P & I*,¹³¹² where a pooling arrangement among protection and indemnity (P & I) marine insurance associations had raised concerns based on Article 82 EC because of the lack of appropriate procedures within the pooling agreement with regard to the possibility for a club to provide re-insurance to a third insurer. The amendments proposed by the addressees of the Commission's statement of objections included an arbitration procedure that would be available in appropriate cases. As a result of the amendments, the Commission chose to grant a negative clearance as to Article 82 EC.¹³¹³

Arbitration has also been encouraged by the Commission for footballer transfer disputes. At a meeting of three Commissioners - one being the Commissioner responsible for competition - with the Presidents of FIFA and UEFA in 2001, FIFA and UEFA undertook to adopt new transfer rules on the basis of a number of principles, one of which was the setting up of joint

¹³¹⁰ Commission Press Release IP/95/736.

¹³¹¹ Commission Press Release IP/99/781.

¹³¹² Commission Decision 99/329/EC of 12 April 1999 (*P&I Clubs, IGA and P&I Clubs, Pooling Agreement*), OJ [1999] L 125/12, para. 28.

¹³¹³ The fact that a formal negative clearance was given does not change the fact of the informal settlement here. Indeed, the operative part of the Decision has no mention of that but merely proceeds to grant a negative clearance to some practices and an exemption to some other - unrelated to the arbitration mechanism - practices.

arbitration bodies made up of representatives of players and clubs.¹³¹⁴ The Commission subsequently closed investigations into FIFA regulations on international transfer of footballers.¹³¹⁵ A Football Arbitration Tribunal would also be set up as an appeal body, one chamber of which would also have a joint composition and would resolve international transfer disputes. According to the Commission these new arbitration bodies would deal rapidly with the pertinent disputes. However, provision has been made that players should not be prevented from seizing the ordinary state courts, if they so wish. Sport arbitration in general has many specific elements that make it not exactly representative of the established notion of arbitration. It is in this context that we should also see the preserved option of footballers to seize the state courts instead of these arbitral bodies. In any case, this case is indicative of a friendlier approach of the Commission towards alternative dispute resolution and arbitration in that area.

From a competition law point of view the setting up of such arbitration bodies together with the other principles that FIFA and UEFA undertook to respect, essentially constitute informal commitments accepted by the Commission, in order for it not to open proceedings further to Articles 81 and 82 EC.

Informal commitments to arbitrate were also received by the Commission in the *BMW and General Motors (Opel)* cases¹³¹⁶ that were opened in 2003/early 2004 and closed in the course of 2005. The Commission's competition concerns related to (i) unjustified obstacles to multi-brand distribution and servicing, and (ii) unnecessary restrictions on garages for becoming members of these manufacturers' authorised repair networks. As regards the possibility for dealers to sell competing brands of cars and in view of the potential deterrent effect of mechanisms for setting sales targets and evaluating performance on multi-brand dealers, GM undertook to mutually agree sales targets with dealers and to make such targets subject to arbitration in the case of dispute.

As mentioned above, these are informal settlements and any "breach" of the promise to arbitrate a dispute cannot give rise to an actionable right to arbitrate for a third party. In addition, the Commission lacks the power specifically to enjoin the company in question to have recourse to arbitration or to impose fines on it. Naturally, the Commission could pursue

¹³¹⁴ Press Releases IP/01/209 and IP/01/314. See also *Commission XXXIst Report on Competition Policy - 2001* (Brussels/Luxembourg, 2002), pp. 48-49.

¹³¹⁵ Press Release IP/02/824.

¹³¹⁶ Case COMP/38.771-*Europäischer BMW- und Mini Partnerverband eV/BMW AG*; Case COMP/38.864-*PO/General Motors - Opel distribution agreements* and Case COMP/38.901-*Verband Deutscher Opel-Händler/Adam Opel*. Both cases are reported in *Commission XXXVth Report on Competition Policy - 2005* (Brussels/Luxembourg, 2006), para. 161 *et seq.*

anew its case, based, however, exclusively on Article 81 or 82 EC, and not on the breach of the company's commitment.

ff. Arbitration in Commitment Decisions of Article 9 of Regulation 1/2003

As we just mentioned informal commitments cannot deal in an effective way with a competition problem because their breach does not mean that the Commission has the power to impose sanctions or that third parties can have recourse to national courts and sue for the non-performance of the relevant promises. This particular weakness has, however, been remedied in the new system of enforcement with the introduction of commitment decisions whereby the Commission can accept commitments given by undertakings and then proceed to make them binding on the latter.¹³¹⁷

Undertakings not in compliance with commitments declared binding upon them by Commission decision, face fines up to 10% of their total worldwide turnover in the preceding business year and periodic penalty payments up to 5% of their average daily turnover.¹³¹⁸ In addition, in case of breach of commitments the Commission may reopen proceedings.¹³¹⁹ In the case of arbitration commitments, this possibility makes a very efficient - albeit indirect - enforcement mechanism, if the undertaking concerned does not adhere to its promise to arbitrate the relevant disputes. Then, third parties perceived as the beneficiaries of those arbitration commitments will be able to plead these commitments before national courts.¹³²⁰

It is interesting to note that the fact that the initiative to offer the arbitration commitments lies with the undertakings, means that it is not, legally speaking, the Commission that imposes upon the former the obligation to arbitrate future disputes, but rather the undertakings that propose this mechanism to the Commission. This is very significant, because if the Commission unilaterally imposed upon the undertakings concerned to submit future disputes to arbitration and thus to relinquish their right to seize the state judicial organs, as would normally be the case, this may have given rise to serious human rights concerns.

It remains to be seen how often arbitration will be used in the context of Article 9 commitment decisions. So far, *German Bundesliga* is the only case where arbitration was included in the commitments that were offered to the Commission, which rendered them later

¹³¹⁷ See Paulis and Gauer, *supra* (2003), p. 68, who see in this weakness the rationale for the introduction of the new type of decisions declaring commitments binding.

¹³¹⁸ Arts. 23(2)(c) and 24(1)(c) Reg. 1/2003. See above.

¹³¹⁹ Art. 9(2)(b) Reg. 1/2003.

¹³²⁰ See above, on the general question of invocability of commitments decisions by third parties, and below on the specific question of invocability of arbitration commitments.

binding by decision.¹³²¹ The commitments concerned the central marketing of the media rights of the Bundesliga matches and the award of the related exploitation rights. The arbitration commitment provides for the following:

“The League Association shall agree to arbitration in the event of disputes with third parties over the award procedure. Similarly, it shall oblige a rights marketer to do so, if the latter uses the award procedure after acquiring the exploitation rights. The basis for this is that all interested parties submit to an arbitration procedure when they submit a bid. All such disputes shall be decided without appeal according to the arbitration rules of the German Institute for Arbitration (DIS). Arbitration proceedings shall take place at the headquarters of the League Association. The applicable law shall be German law. The arbitration proceedings shall be conducted in German.”

It is interesting to note that the commitments offered in the similar *FA Premier League* case and the corresponding Article 9 commitments Decision of the Commission include an “independent expertise” mechanism. However, since indeed the tasks of the independent expert are merely fact-finding-oriented, it is expressly stated in the commitments that “the Independent Expert shall act as an expert and not as an arbitrator or mediator”.¹³²² This is a useful and welcome specification that stands in contrast with other instances where the Commission or parties offering commitments to the latter seem to confuse individual expertise with arbitration.

gg. Arbitration as an Imposed Remedy in a Commission Infringement Decision?

It might be useful to wonder whether there could be a place for an imposed arbitration remedy by means of an infringement decision pursuant to Article 7 of Regulation 1/2003. In other words, the question is whether the Commission could order, as a positive measure, apart from the discontinuation and avoidance of a certain conduct, the submission of certain disputes with third parties to arbitration.

It is interesting to note that the Commission imposed a duty to submit certain facts to individual expertise in its *NDC/IMS* interim measures Decision,¹³²³ in which it had enjoined

¹³²¹ *Joint selling of the media rights to the German Bundesliga* Decision, *op.cit.*, point 3.8 of the Annex.

¹³²² *Joint selling of the media rights to the FA Premier League* Decision, *op.cit.*, point 9.5.2 of the Annex.

¹³²³ Commission Decision 2002/165/EC of 3 July 2001 (*NDC Health/IMS Health: Interim Measures*), OJ [2002] L 59/18, suspended by order of the President of the CFI (case T-184/01 R, *IMS Health Inc. v.*

the addressee, IMS, to license a product to certain undertakings on the payment of a reasonable fee that should be determined “by mutual agreement between IMS and the party requesting the licence or failing that, by a Decision of the Commission on the basis of a determination by one or more independent experts”, which the Commission defined as a “suitably qualified person”. The expert would be chosen by mutual agreement of IMS and the other party, or if the parties could not agree, it would be appointed by the Commission, and the costs of the expertise would be borne by the licensor and the licensee on an equal basis. His determination would then be transmitted to the Commission for approval.¹³²⁴ Even more recently, the Commission imposed a trustee mechanism, admittedly with many decisional and dispute resolution elements, in its *Microsoft* Decision.¹³²⁵

Our view is that the imposition of such mechanisms in an infringement decision are not compatible with their consensual nature and with the system of remedies and sanctions provided for in Regulation 1/2003. Then, while such mechanisms can be useful, if based on settlements with the Commission, by reducing the Commission’s workload with regard to monitoring of compliance, such administrative exigencies cannot justify the imposition of these mechanisms through the use of state prerogatives. In other words, the fact that the Commission would like to have them cannot mean that it should be free to impose them at free will. In the specific context of an infringement proceeding and decision, it is the Commission’s own duty to deal with the monitoring of the infringer’s compliance with the competition rules. It would also be inappropriate for the Commission in the context of the exercise of its public enforcement powers unilaterally to “delegate” such enforcement powers that pertain to *ordre public*¹³²⁶ to a third party, expert, trustee or arbitrator. Particularly with regard to arbitration, a unilateral imposition of arbitration by the Commission would offend against fundamental rights, since the addressee of the infringement decision and of the hypothetical arbitration remedy would be stripped of his right to have access to state courts (*droit au juge naturel*). Indeed, the very nature of arbitration is based on consensus and not on compulsion and such a hypothetical mechanism would not in reality be arbitration.

Commission, [2002] ECR II-3193) and subsequently withdrawn by Commission Decision 2003/741/EC of 13 August 2003 (*NDC Health/IMS Health: Interim Measures*), OJ [2003] L 268/69.

¹³²⁴ Art. 2 and paras. 215 and 219 of the 2001 *IMS* Decision, *op.cit.*

¹³²⁵ Commission Decision of 24 March 2004 (*Microsoft*), Art. 7 and para. 1043 *et seq.*, currently under appeal in case T-201/04, *Microsoft Corp. v. Commission*. Microsoft has also challenged the imposition of the trustee mechanism and the CFI is bound to decide on that point, too. See also Commission Decision of 28 July 2005 (*Microsoft*), defining the role and function of the trustee.

¹³²⁶ Compare Poillot-Peruzzetto, 15(8/9) *Contr. Conc. Consomm.* 24 (2005).

hh. A Critical Evaluation of the Nature and Function of Arbitration in Merger and Other Cases

i. Evaluation from the Community Law Standpoint

It might be interesting to speculate on the reasons why the Commission “discovered” arbitration as a procedural remedy in the early 1990s, in order to control the post-clearance conduct of merging companies. In this regard, a parallelism can be drawn with the increasing use of trustees, who undertake to ensure compliance with behavioural or – more often – structural remedies, usually divestiture commitments. There are many similarities with the case of arbitration. Thus, the trustee is also a “third party”, usually proposed by the merging parties. The Commission subsequently approves his appointment and mandate, which can either be to oversee the parties’ compliance with preservation orders – in order to maintain the independence, economic viability, marketability and competitiveness of the business in question pending its divestiture (“hold-separate trustee”) – or to generally monitor the parties’ compliance with commitments (“monitoring trustee”),¹³²⁷ or even to effectuate compliance with the commitments, thus proceeding himself to the implementation of the divestiture (“divestiture trustee”).¹³²⁸ In the latter case, the divestiture trustee reviews the suitability of the proposed purchaser by the parties, or can even dispose of the business himself within a specific deadline at any price according to commercial usages. In all cases the Commission is consulted and gives its prior approval.¹³²⁹

In 2002 the Commission even proceeded to the adoption of a Standard Trustee Mandate, which is the recommended model trustee mandate in case of such commitments.¹³³⁰ The model trustee mandate provides for an elaborate system of functions to be performed by the hold-separate, monitoring, and divestiture trustees. It is clear that the Commission views the

¹³²⁷ The monitoring trustee may also supervise the hold-separate trustee.

¹³²⁸ On trustees see D’Ormesson and Kerjean, *supra* (1998), pp. 491-492; Navarro Varona, Font Galarza, Folguera Crespo and Briones Alonso, *supra* (2005), p. 395; Lindsay, *supra* (2003), para. 9-01. The trustee is usually an investment bank, a management consulting or an accounting company.

¹³²⁹ See e.g. Commission Decision of 8 May 1995 (M.580-ABB/Daimler-Benz), para. 139, integrating the commitment of the parties; Commission Decision of 18 April 1995 (M.582-Orkla/Volvo), para. 123; *Kimberly-Clark/Scott* Decision, *op.cit.*, para. 233, integrating the commitment (interestingly enough, there is also a reference to arbitration for disputes between the parties and the third party purchasing the divested business after the end of the trustee’s mandate); Commission Decision of 6 October 1999 (M.1663-Alcan/Alusuisse), paras. 130, 135, 141; Commission Decision of 15 December 1999 (M.1683-The Coca-Cola Company/Kar-Tess Group (Hellenic Bottling)), para. 39 and annexed commitments; Commission Decision of 11 July 2000 (M.2032-SCA Packaging/Metsä Corrugated), para. 41 and points 5 et seq. of the annexed commitment; Commission Decision of 25 October 2001 (M.2602-Gerling/NCA), annexed commitments.

¹³³⁰ See Commission Press Release IP/02/1091 of 18 July 2002.

trustees as fully dependent on itself. Commission officials have referred to them as acting on behalf of the Commission, indeed as its “eyes and ears”, in order to ensure full compliance of the parties with their commitments. Indeed, there has also been discussion as to whether the Commission should become a party to the trustee agreement.¹³³¹

This *excursus* may explain why the Commission might have attempted to view arbitration and arbitrators in a similar vein. However, apart from the fact that arbitrators, like trustees, have the quality of a third party, any other parallelism is inappropriate. Arbitration is a form of private justice governed by the principles of neutrality and independence, exactly as state courts. While there is a contract between the litigants and the arbitrators, this does not mean that the latter become the agents or mandatories of the former. Arbitrators are not bound by the parties’ will except insofar as this will is expressed in the arbitration clause. By the same token, there can be no possibility of the Commission being a co-signatory of the arbitration agreement as such, because the Commission is not party to the dispute.

While the Commission appreciates these fundamental differences between trustees and arbitrators, it is also clear that it sees the function of the two mechanisms in terms of competition law enforcement as similar.¹³³² Thus, the Commission sees as a first advantage of arbitration the fact that it provides for an on-going monitoring of commitments, involving potentially an unlimited number of market players. This means that the Commission’s limited administrative resources will not be wasted in permanent monitoring of the commitments. It also means that the Commission will not have to take decisions of regulatory nature, such as decisions on terms and conditions, fees, technical issues of access and interoperability, etc. Indeed, the Commission is not a regulatory authority to be able to tackle such issues itself.¹³³³ At the same time, arbitration leads to a *decision* - as opposed to a trustee’s or a third party’s determination - that is itself enforceable and there is no need for the commission to exercise its administrative powers to order compliance.

Arbitration commitments themselves have not received much attention by the Community courts, at least with regard to the fundamental question whether the Commission has the power to accept them thereby in reality “delegating” some of its decisional and enforcement powers to a third party. There are, however, a few incidental references by the Court of First Instance to such arbitration commitments which show that they are viewed rather positively.

¹³³¹ See Mederer, “Remedies in Merger Cases”, Speech Delivered at the Fifth Annual Competition Conference, IBA (Fiesole/Florence, 21 September 2001), in: <http://europa.eu.int/comm/competition/speeches>, p. 7.

¹³³² See for example Lübking, “Enforcing Commitments under the ECMR through Arbitration – Is it still Arbitration?”, IBC Conference on Alternative Dispute Resolution and Competition (1 March 2005, London).

¹³³³ See *idem*.

Thus, in a challenge by a third party against the *BSkyB/Kirch Pay TV* merger clearance Decision, which was subject to conditions referring *inter alia* to arbitration commitments, the Court rejected the applicant's argument that the commitments offered did not resolve the competition problems and noted that if there were no commitments, it would have been necessary to pursue an Article 82 EC proceeding at national or Community level, the outcome of which would be uncertain and, in any event, more difficult to impose. Traders would thus be faced with greater legal uncertainty. The specific commitments, on the other hand, imposed "detailed obligations to be met within short periods of time, compliance with which is ensured by *an effective, binding arbitration procedure* which reverses the burden of proof and places it on the [acquirer]". Commitments thus offered far greater legal certainty than Article 82 EC.¹³³⁴ The Court also rejected the applicant's arguments about the difficulties allegedly encountered by a third party to gain access to a relevant market, noting that that party could have used the arbitration mechanism provided in the commitments, yet it chose not to do so.¹³³⁵

In sum, the Court saw the arbitration mechanism concerned as an efficient means to swiftly remedy specific problems encountered by third parties but also as an important corollary to the Commission's monitoring duties, which by implication reduces the Commission's administrative burden to monitor in perpetuity compliance by merging parties with their commitments.¹³³⁶ The delegation element becomes here very clear. Finally, the Court did not neglect to note that in the event of the merging party's failure to comply with the result of the arbitration proceedings, i.e. with the arbitral award, "the Commission would have the possibility of revoking the contested decision pursuant to Article 8(5) of Regulation No 4064/89".¹³³⁷

Similarly, in its recent *Easyjet* judgment, the Court of First Instance rejected the applicant's argument against the *Air France/KLM* merger clearance Decision that the Commission had failed to make the contested Decision expressly subject to revocation should the commitments not be fulfilled, and observed that the contested decision laid down a fast-track arbitration procedure for resolving disputes with a third party if the latter had reason to

¹³³⁴ Case T-158/00, *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v. Commission*, [2003] ECR II-3825, para. 203, emphasis added.

¹³³⁵ *Ibid*, para. 279.

¹³³⁶ *Ibid*, para. 295.

¹³³⁷ *Ibid*, para. 352. Reference should currently be made to Art. 8(6)(b) Reg. 139/2004.

believe that the merged entity is not complying with the terms of the commitments made vis-à-vis that party.¹³³⁸

ii. Evaluation from the Arbitration Standpoint

It can be seriously doubted whether the references to arbitration included in some of the Commission decisions referred to above – particularly in the merger area – and in Regulation 1400/2002 refer to the conventional notion of arbitration, as a system of resolution of civil disputes by private judges, equivalent to state justice. Indeed, there are many instances where such references to arbitration would in reality better describe third-party expertise or the determination of a specific (usually technical) issue by a third party, whose decision is not an arbitral award.

If we take as an example the numerous arbitration commitments in the merger area, this is not a generalised problem but only arises in those arbitration commitments and clauses that are rather atypical or even “pathological”. Such clauses may lack some of the fundamental characteristics of arbitration, i.e. the final resolution of a legal dispute between the parties to an arbitration clause by an independent and impartial private tribunal. That some of these clauses provide for a final say for the European Commission, which can have more or less broad powers of intervention in the course of the arbitration proceedings, or that the arbitral award is not intended to be final but may be reviewed by state courts and competition or regulatory authorities, may be elements that indicate a non-arbitration mechanism.

Then, in some cases there is a clear confusion on the part of the Commission between arbitrators, third-party technical experts and trustees. The Commission may be excusable in accepting unorthodox arbitration commitments with many regulatory elements, but is certainly not excusable in confusing third-party expertise with arbitration. To the extent that a remedy is better put in effect through the use of experts or trustees, then the Commission should encourage the correct use of those terms in the commitments and should refrain from using the term “arbitration”. On the other hand, to the extent that a dispute resolution mechanism would be more appropriate, then indeed the Commission should expressly refer to arbitration and distinguish this from expertise.

From the above, it is evident that the dispute resolution mechanism in some of these cases is quite extraordinary in that it admits a substantial degree of intervention by a public authority,

¹³³⁸ Case T-177/04, *EasyJet Airline Co. Ltd. v. Commission*, Judgment of 4 July 2006, para. 186.

which is naturally not a party to the arbitration agreement or the arbitration process, yet it enjoys a wide range of powers with direct bearing upon the arbitration procedure and the arbitral award. Some authors have referred to this kind of arbitration as “regulatory arbitration”.¹³³⁹ The Commission’s direct or indirect involvement is certainly a challenge for the most fundamental principles of arbitration, in particular for its independence and the principles of confidentiality and privity.

This problem, however, must be approached from a practical rather than a theoretical standpoint. What matters is not really the name, but rather the legal consequences of the dispute resolution mechanism at issue. Namely, it is important to know whether the specific dispute resolution clause is apt to be relied upon in order to relieve the state courts of their competence, whether the proceedings initiated can qualify as *lis pendens*, whether the final outcome of that mechanism, the award/decision, can produce a *res judicata* effect and whether it is enforceable under domestic and international law, notably under the New York Convention. This is certainly a review that can only be undertaken on an *ad hoc* basis.

It can be argued in favour of considering such mechanisms as arbitration that if the paramount legal basis of the arbitration is the will of the parties, as enshrined in the arbitration agreement, and if the arbitration agreement itself provides for certain “irritants”, there should be no doubt that this is indeed arbitration. The arbitration clause and private autonomy is the “constitution” or the *Grundnorm* of arbitration. If state constitutions are superior norms overriding any legal provision that runs counter to them, in the same way an unusual arbitration clause should be accepted *telle quelle* by all parties involved in the arbitration, including the arbitrators.

However, there are always limits in what the parties can define as arbitration and to their powers to draft the arbitration agreement. While contractual freedom remains the rule, arbitration is a very specific mechanism which is not just the creation of that freedom, but is also recognised by the law as a dispute resolution mechanism with specific legal effects attached to it. Providing for unorthodox arbitration clauses might bring into question these specific legal effects that legal systems attach to arbitration. This might impair the effectiveness and consistency of arbitration as an institution, thus, by implication, impairing also the effectiveness of arbitration as a procedural remedy in the area of competition law enforcement altogether. To give a practical example, an overly unorthodox “regulatory” arbitration pursuant to a merger-related commitment might not be recognised as arbitration in

¹³³⁹ See, in particular, Blessing, *supra* (2003), p. 3, who views positively this development.

the domestic context of a Member State or in the international context of the New York Convention. Especially in the latter case, a foreign court might not be ready to recognise pursuant to the New York Convention an “arbitral award” that has been rendered by “regulatory arbitrators”, who in reality acted as technical experts for the Commission, or an award that has been “confirmed” or even slightly “varied” by the Commission.¹³⁴⁰ Such a result would be a serious blow for arbitration in general and for the effectiveness of the arbitration commitments in specific.

Thus, our view is that the involvement of the Commission in the selection, appointment or confirmation of arbitrators as well as in the arbitration proceedings in general¹³⁴¹ should be disapproved and avoided, since it does not do justice to the credibility and independence of arbitration, as this is a task usually exercised by courts or by institutional arbitration bodies. We must equally oppose to the generalised possibility of the Commission’s involvement during the arbitration procedure, as is now typically provided for in the recent last generation arbitration commitments. While an intervention in the form of *amicus curiae* may on an *ad hoc* basis be desirable, it should not be institutionalised. Finally, attention must be paid by all parties and mostly by the Commission to make clear distinctions between arbitration and third-party expertise.¹³⁴²

iii. Enforcement of the Arbitration Commitments

It is interesting to analyse the legal mechanics of arbitration provided for in antitrust or merger commitments. Although, the existence of an arbitration clause is a pre-requisite for arbitration, there are some interesting features of arbitration commitments that differentiate this particular kind of arbitration.

First of all, we must stress that it is not critical for the offerors of these commitments to refer explicitly in their commitment to their promise (a) to submit a dispute to arbitration *and also* (b) to comply with the final arbitral award that will transpire out of the proceeding. To the

¹³⁴⁰ For example, there have been long-standing problems with regard to the recognition and enforcement of Italian arbitral awards rendered pursuant to an *arbitrato irrituale*, which has many unconventional elements. Italian courts have held that it is arbitration and falls under the New York Convention (Corte di Cassazione, 15-12-82, n° 6915, *Federal Commerce and Navigation Ltd. v. Rocco Giuseppe e Figli s.n.c.*, 106 *Il Foro Italiano* I-2200 (1983)), while other courts such as the German *Bundesgerichtshof* have held otherwise (BGH, 8.10.81, IIIZR 42/80, *Compania Italiana di Assicurazioni v. Schwarzmeer und Ostsee Versicherungsaktiengesellschaft*, 35 NJW 1224 (1982)).

¹³⁴¹ Compare for example the arbitration commitment in the *BSkyB/Kirch Pay TV* Decision, *op.cit.*, where the Commission has the power “to lay down the arbitral process itself”.

¹³⁴² Indeed, we would recommend an amendment of Reg. 1400/2002 and its accompanying communications to remedy this specific problem.

extent they commit to arbitrate, implicitly they also commit to adhere to the result of the arbitration. Any other argument would be formalistic and would not be in conformity with either the *effet utile* of Community law or even the *effet utile* of arbitration as an institution. The thoughts below therefore refer to both types of compliance.

Enforcement of an arbitration commitment can be attained through two distinct channels: First, through recourse to the administrative enforcement powers of the Commission (or any other relevant authority that has accepted the commitments), and second, through civil enforcement either before the arbitral tribunal itself or before state courts.

A fundamental distinction must be made between the following three cases:

- (a) Arbitration commitments made binding by means of Commission decision on the addressee of that decision: These can be contained either in a merger clearance decision subject to conditions or obligations to arbitrate, or in a commitments decision pursuant to Article 9 of Regulation 1/2003. Starting from the enforceability of such arbitration commitments in the context of EC administrative law, it is clear that the addressee of a Commission decision containing conditions or obligations to arbitrate is under a duty to have recourse to arbitration, if the party designed to be protected comes forward with an arbitration request, otherwise the benefit that this person accrues from the Commission decision might be withdrawn by the Commission or the Commission could impose fines and periodic penalty payments to impose compliance.¹³⁴³ By itself, Commission intervention is the most powerful means to enforce an arbitration commitment.

From a purely theoretical point of view, however, it is interesting to analyse whether these arbitration commitments can be executed through civil enforcement. In reality the third party will not ask for the “enforcement of the arbitration agreement” as such. If a third party wishes to resolve a dispute with the offerors of the arbitration commitment, he will be able to avail himself of the arbitration commitment and will merely accept the promisor’s *erga omnes* offer to arbitrate the relevant dispute by simply acquiescing in the arbitration and by appointing an arbitrator.¹³⁴⁴ At this

¹³⁴³ See above on sanctions in this context. In the merger control area, for breach of obligations, see Arts. 6(3)(b), 8(6)(b), 6(4) Reg. 139/2004, and for breach of conditions, see Art. 7(1) in combination with Art. 14(2)(b), and Arts. 8(4), 14(2)(c) and 15(1)(d) Reg. 139/2004. That the Commission can punish non-compliance with an arbitration commitment or with the resulting arbitral award, has also been explicitly noted by the CFI: see *ARD*, *op.cit.*, para. 352; *EasyJet*, *op.cit.*, para. 188. For the consequences of non-compliance with an Art. 9 Reg. 1/2003 decision, see Arts. 9(2)(b), 23(2)(c) and 24(1)(c) Reg. 1/2003.

¹³⁴⁴ See e.g. the arbitration procedure envisaged in the *Shell/DEA* Decision, *op.cit.*, Art. 16 of the annexed commitments, and in the *Telia Sonera* Decision, *op.cit.*, section F(c) of the annexed commitments. See also the

point, an arbitration agreement will exist as between the parties and in case of the promisor's recalcitrance, the third party will be able to pursue the enforcement of the arbitration agreement before a national court, if the arbitration commitment does not contain anything more specific.¹³⁴⁵

Needless to say, since in most of these cases the arbitration commitment has been given to the benefit of third parties, a third party may wish to forego his right to have recourse to arbitration and instead seize a civil court with a claim based on the commitments in contract or tort. In such a case, the promisor will have no right to insist on the arbitration mechanism, since there will be no arbitration agreement as such in the first place. In other words, the arbitration commitment is binding only unilaterally upon the undertaking that gave the commitment and not upon third parties which may choose to go to the civil courts instead of the arbitrators. In that sense these arbitration clauses can be described as similar to so-called "unilateral or optional arbitration clauses", whereby one of the parties to a contract has an option to elect to refer the dispute to arbitration.¹³⁴⁶ Usually, such unilateral arbitration clauses reflect the stronger bargaining position of their beneficiaries, but in our case it is in fact the party that is perceived as "weaker" that such arbitration clauses aim at benefiting, in order to satisfy the concerns of a competition authority.

- (b) Conditions or obligations to arbitrate contained in the old individual exemption decisions: These are clearly binding on the addressees of those decisions. Under the old system of enforcement the Commission had direct powers to enforce them.¹³⁴⁷ Under the new system of enforcement existing old exemption decisions that are still in force remain valid until their expiration date.¹³⁴⁸

As to civil enforcement, these decisions can be relied upon by third parties and the above analysis is valid *mutatis mutandis* here, too.

last generation arbitration commitments contained in recent Decisions, which are clearer in that respect and provide for an *erga omnes* promise to arbitrate (see above).

¹³⁴⁵ On the direct effect of such commitment decisions creating rights for third parties, reference is made to the discussion above on the application by national courts of Art. 9 Reg. 1/2003 commitment decisions. This analysis is also valid for conditional merger clearance decisions.

¹³⁴⁶ The validity of such clauses has been accepted in England, Italy, France and Germany. See further Nesbitt and Quinlan, "The Status and Operation of Unilateral or Optional Arbitration Clauses", 22 Arb.Int'l 133 (2006), pp. 134, 144-147.

¹³⁴⁷ See with regard to the breach of obligations Arts. 8(3)(b) and 15(2)(b) Reg. 17/1962. In case of breach of a condition the exemption would no longer stand. See above.

¹³⁴⁸ See above. Pursuant to Art. 43(1) Reg. 1/2003, Article 8(3) Reg. 17/1962, which gives the Commission the power to revoke an exemption decision in case of breach of an obligation, continues to apply to those decisions that are still in force until the date of their expiration.

(c) “Informal” arbitration commitments: These can be given to the Commission either in the context of merger control, in which case the Commission clears the merger with or without conditions or obligations but the arbitration commitment is not transformed to a condition or obligation, or alternatively in the course of application of Articles 81 and 82 EC, in which case the Commission decides not to take issue with a specific agreement or practice because the informal commitment to arbitrate eliminates its related concerns. In the context of merger control, it is not always obvious whether the breach of such commitments entails no consequences at all. As mentioned above, the fact that a commitment may not formally be the subject of a condition or obligation within the meaning of Articles 6 and 8 of the Merger Regulation may not be decisive. Commitments mentioned in the grounds of an authorisation decision or annexed to it may yet entail legal effects.¹³⁴⁹ If however the commitments are neither mentioned nor annexed, it is most likely that their breach will have no consequence for their offeror.¹³⁵⁰ In the context of Articles 81 and 82 EC, since these commitments are not integrated in conditions or obligations, the only possibility for the Commission is to reopen proceedings, which is by itself a powerful mechanism to induce compliance.

Finally, since these arbitration commitments are informal communications to the Commission, they cannot be executed by means of civil enforcement. Even if a third party wanted to rely on the arbitration commitment and request arbitration or appoint an arbitrator, this would not be acceptance of a valid *erga omnes* offer to arbitrate because the offer to arbitrate was only addressed to the Commission informally and not to any third parties. Besides, there would be no formal decision for third parties to base direct rights upon, other than a mere informal communication to another party (the Commission).

iv. Lessons from the Limited Practice of “Regulatory Arbitration”

It is not easy to identify the cases where arbitration mechanisms have been put in effect in the area of antitrust or of post-merger clearance when arbitration was provided for in the

¹³⁴⁹ Compare cases T-125/97 and T-127/97, *Coca-Cola, op.cit.*, para. 97.

¹³⁵⁰ Arts. 6(3)(a) and 8(6)(a) Reg. 139/2004 give the Commission the power to revoke an authorisation decision obtained on the basis of incorrect information for which one of the merging parties is responsible or by deceit, but this would not normally cover breach of commitments that have not been turned to conditions or obligations and are neither mentioned nor annexed in the decision.

commitments accepted by the Commission. There is only disparate evidence about these cases but it is certain that arbitration has been used in some instances. DG-COMP has recently produced an in-house study on merger remedies, where there is some information about this question.¹³⁵¹ Indeed, the Commission officials included a specific question to the parties and to trustees as to whether any post-closing matters had been referred to arbitration.¹³⁵² One reservation is, however, that it cannot be ascertained whether recourse to arbitration in those cases was related to the existence of an arbitration or another dispute resolution mechanism in the merger commitments themselves or whether the parties decided independently to submit their dispute to arbitration by concluding subsequently an arbitration agreement. In any case, these cases can be representative of how arbitration has worked in a post-clearance context.

Thus, in a Phase II clearance case, where arbitration commitments accompanied exceptionally a divestiture remedy, the seller and buyer of the divested business had to negotiate on the precise number of personnel to be divested with the business. Following the sale, there was a dispute as to whether the seller had fully complied with the obligation to transfer to the buyer the relevant key personnel. The personnel disputes were not resolved, but the purchaser and seller settled their dispute later in an arbitration procedure, which resulted in the seller making a monetary compensation to the purchaser.¹³⁵³ It is interesting, however, to note that the Commission's study deplored the fact that this monetary compensation did not resolve "the effectiveness issue of the remedy in competition terms".¹³⁵⁴

In another case, where again the commitments included a divestiture remedy, the carve-out and transfer remedy mainly required the separation of customers from the seller's accounts and their transfer to the network of the divested business. The carve-out became complicated, as a large number of customers for the divested business were also customers for the seller's other business, and had thus been bundled together in the seller's records. Thus, the segregation of these customers was extremely difficult. The purchaser was not in a position to know the extent to which the seller had failed to transfer fully the required customer lists and, perhaps also as a result of his underestimation of the requisite transition costs, he lost half of the relevant customers. He then filed for arbitration and won a damages award. However, as

¹³⁵¹ European Commission, DG COMP, *Merger Remedies Study*, October 2005, in: http://ec.europa.eu/comm/competition/mergers/others/remedies_study.pdf.

¹³⁵² *Merger Remedies Study*, *op.cit.*, p. 195, Question 62, and p. 203, Question 22.

¹³⁵³ It does not appear that this arbitral award was ever published.

¹³⁵⁴ *Merger Remedies Study*, *op.cit.*, p. 42, para. 49.

the Commission study notes, the damage had already been done through the loss of such a substantial volume of customers, and eventually the buyer was almost bankrupt and sold for a fraction of its original value.¹³⁵⁵

These are telling examples as to the false hopes that the Commission may have placed on arbitration and as to its misunderstanding of the nature of arbitration, which is merely a private dispute resolution mechanism and cannot be elevated to a form of antitrust enforcer with delegated public enforcement powers. Indeed, the Commission itself has admitted the limitations of arbitration in its *GE/Honeywell* prohibition decision. There, it rejected the commitments offered by the parties, promising not to bundle GE with Honeywell products when making offers to customers, unless a competitor, acting either alone or as a team, has bundled similar products or when the customer has requested a bundled offer by GE in writing. In order to ensure compliance with those commitments, the parties had proposed to set up an arbitration scheme, whereby any affected interested third party could initiate arbitration. The Commission, however, rejected this offer because the proposed commitments required a significant amount of monitoring on its part and the arbitration mechanism would “give rise to endless litigation in which the Commission [would] have to participate in its capacity as the recipient of the [commitments]”.¹³⁵⁶

On a more positive note, from a competition law perspective, there may be times where the arbitration mechanism provided for in the commitments has never been put in effect yet its mere existence is an effective tool of preventive nature that disciplines the parties and thus obliges them to fully comply with their commitments. Thus, in a case involving a Phase I remedy to enter into non-discriminatory supply agreements and to grant access to certain technology on non-discriminatory terms, the parties had created an “arbitration committee” to oversee the implementation of the commitments. The arbitration panel was never convened, because no third party felt threatened by the market position of the new company and “the arbitration protections were adequate to safeguard the few interested companies in the sector”.¹³⁵⁷

In any event, practice indeed shows that arbitration is foremostly a civil dispute resolution method and nothing more than that. It can of course be used in many contexts, one being competition law, but it is not – and it should not be – an alternative to regulation or competition law enforcement employed by administrative authorities.

¹³⁵⁵ Merger Remedies Study, *op.cit.*, p. 83, para. 9.

¹³⁵⁶ Commission Decision of 3 July 2001 (M.2220-*General Electric/Honeywell*), OJ [2004] L 48/1, paras. 499 and 531.

¹³⁵⁷ Merger Remedies Study, *op.cit.*, p. 118, para. 14.

3. The Power of Arbitrators to Apply EC Competition Law

a. Arbitrability of EC Competition Law

A old and, one would say, “traditional” question of equally high theoretical and practical significance has been the “arbitrability” of disputes, i.e. whether the parties to an arbitration clause can submit to arbitration certain disputes and whether the arbitrators themselves have the power to decide them. It is basically the contractual nature of private arbitration that gives rise to this question. Unlike state courts, for which of course there is never an issue of “justiciability”, arbitration is the creation of private autonomy. For this reason it has long been debated whether certain disputes that pertain to public law and refer also to the public interest can be settled and submitted to arbitration.¹³⁵⁸

The problems pertaining to the arbitrability of competition law disputes relate exactly to the public interest character of such disputes. The paramount objective of antitrust laws, and certainly of EC competition law, is the safeguarding of effective competition in the market.¹³⁵⁹ Private interests, as such, are important to the extent that their protection can be accommodated in the simultaneous protection of the broader public interest.

In addition, private autonomy has a secondary role in competition law disputes. Indeed, competition law places limits upon it.¹³⁶⁰ If we take Article 81 EC as our paradigm, the nullity of anti-competitive agreements is absolute and must be raised by courts *ex officio*, notwithstanding the will of the litigants. During the civil proceedings a competition authority may wish to intervene as *amicus curiae* and make submissions if the protection of the public interest so requires. At the same time, parties cannot settle their disputes through an in-court or out-of-court settlement that runs counter to competition law. At the public enforcement side, the Commission and national competition authorities can initiate proceedings of their own motion without the necessity of a complaint. Even if proceedings have been opened pursuant to a complaint, the withdrawal of the latter or the settlement of the case by the

¹³⁵⁸ There are areas which seem at first sight to be related to the private rather than to the public interest, yet are off-limits for arbitration. For example a dispute about the sale of a human organ. In reality, however, the public interest – public policy element is present here too. In that case it is the public interest pertaining to the protection of human dignity in a given jurisdiction.

¹³⁵⁹ See above on the public and private interests protected by competition rules.

¹³⁶⁰ As mentioned above, a recognition of a high degree of private autonomy is a *sine qua non* condition for the establishment of effective competition in the market. However, it is also possible that private autonomy might be exercised in an anti-competitive way. Indeed, competition law does nothing more than to impose limits on private autonomy in order to protect the public interest.

complainant would not affect at all the former, which can be continued by the relevant authority *ex officio*.¹³⁶¹ In the only instances, where private initiative played a role, i.e. in the cases of applications for negative clearance and for individual exemption under Regulation 17/1962,¹³⁶² again the public authority had a decisive role and it acted in the public interest.

Then, private parties cannot dispose of the antitrust rules or exclude their applicability. First, domestically, the Treaty competition rules constitute mandatory public law provisions,¹³⁶³ primarily aiming at safeguarding the public interest. The Court of First Instance has stressed that “the public policy nature of competition law is specifically designed to render its provisions mandatory and to prohibit traders from circumventing them in their agreements”.¹³⁶⁴ As a result, private parties cannot conclude a contract and explicitly or implicitly decide that their contract will not be subject to EC competition law. The application of the prohibitory provisions of Articles 81 and 82 EC is obligatory, automatic, and independent of the parties’ will (*ius cogens*).¹³⁶⁵ Second, they cannot be set aside by the parties’ choice of a foreign law¹³⁶⁶ since they are mandatory in the private international law sense (*lois d’application immédiate*).¹³⁶⁷

All these elements of competition law had led in the past to the exclusion of the arbitrability of antitrust-related disputes, because of their public policy (*ordre public*) nature.¹³⁶⁸ This attitude, however, was reversed in the 1980s and early 1990s and it can be said with certainty

¹³⁶¹ See Norberg, *supra* (1999), pp. 165-166.

¹³⁶² The role of private initiative in these cases was limited to the fact that an application for exemption or negative clearance was a requirement for a decision of the Commission granting one or the other. Thus, an exemption or a negative clearance could not be granted *ex officio* and the Commission could only grant one or the other, corresponding to exactly what the applicant sought. We should note, however, that under the current legal exception system such applications are no longer possible and any inapplicability decisions of the Commission will be taken *ex officio*, without parties’ having a right to that extent (Art. 10 Reg. 1/2003).

¹³⁶³ See e.g. Schröter, *supra* (2003), p. 98, referring to “*zwingendes öffentliches Recht*”.

¹³⁶⁴ Case T-128/98, *Aéroports de Paris v. Commission*, [2000] ECR II-3929, para. 241. It is noteworthy that this general statement seems to attribute a public policy nature to any competition norms, national or Community. See also case T-34/92, *Fiatagri and New Holland Ford v. Commission*, [1994] ECR II-905, para. 39, where it is stressed that “Article [81(1)] of the Treaty lays down a fundamental prohibition of agreements which are anti-competitive in character. That provision, adopted as a matter of *public policy*, is therefore *binding* on the applicant undertakings...” (emphasis added). Compare now the express provisions of *Eco Swiss, op.cit.*, para. 39; *Manfredi, op.cit.*, para. 31.

¹³⁶⁵ Compare also Commission Decision 2002/759/EC of 5 December 2001 (*Luxembourg Brewers*), OJ [2002] L 253/21, para. 62.

¹³⁶⁶ In this case, foreign law means the law of a country that is not an EU Member State, since Community competition law is an integral part of all EU Member States’ laws, therefore the choice of any national law within the EU would not lead to an application of “foreign” law with respect to the Treaty competition rules.

¹³⁶⁷ See e.g. Schröter, *supra* (2003), p. 99; C. von Bar and P. Mankowski, *Internationales Privatrecht*, Vol. I, *Allgemeine Lehren* (München, 2003), p. 256.

¹³⁶⁸ The arbitrability has nothing to do, however, with the fact that in some countries competition disputes are of administrative nature and are submitted to the competence of administrative authorities and courts (as it is put by Karydis, “The Impact of Competition Rules on the Institution of Arbitration: Treatment in French, Greek and Community Law”, 37 *Nomiko Vima* 1024 (1989) [in Greek], p. 1031). Indeed, disputes of administrative nature have been invariably considered arbitrable.

that arbitrability of competition law disputes has now been generally accepted in all jurisdiction with developed antitrust regimes. Indeed, it is not an overstatement to say that, while arbitrability remains in principle a question governed by state (municipal) law, the increased internationalisation of arbitration law and practice and the emergence of transnational principles have led to a general transnational principle of favour to arbitrability (*favor arbitrandi*).¹³⁶⁹

Arbitrability of competition law-related disputes can now be considered such a transnational principle. This is also supported by the arbitration practice itself, which is quite rich on the question of arbitrability of such claims. The plea that a certain dispute is not arbitrable because it pertains to public rules on the protection of free competition has been heard quite often by arbitrators and has been invariably rejected, especially in the last decade or so. In all of these cases, the usual approach taken by arbitrators is that competition law is arbitrable and therefore the arbitration clause itself is fully operative and gives the power to the arbitral tribunal to hear arguments and decide a dispute that also involves competition law.¹³⁷⁰

It is interesting that the shift in the negative attitudes concerning the arbitrability of competition law started in the US with the 1985 ruling of the US Supreme Court in *Mitsubishi*.¹³⁷¹ This is important because the US also have the oldest and most developed system of competition law with a strong public policy nature also providing for criminal sanctions. That the reversal took place there, was bound therefore to influence other jurisdictions that have followed course.

In *Mitsubishi* the US Supreme Court adopted an extremely favourable attitude to international commercial arbitration and held that an agreement to submit antitrust disputes to international

¹³⁶⁹ Compare M. Lehmann, *Die Schiedsfähigkeit wirtschaftsrechtlicher Streitigkeiten als transnationales Rechtsprinzip* (Baden-Baden, 2003); *idem*, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice", 42 *Columbia JTransnat'IL* 753 (2004).

¹³⁷⁰ A rare and famous exception is a Swiss arbitration case, where the arbitral tribunal declared itself incompetent to decide a question of EC competition law. At the setting aside stage, the Swiss Supreme Court disagreed with the tribunal's finding of lack of jurisdiction, considered that finding as *infra petita*, and ordered that the tribunal decide the competition law issue. See Tribunal Fédéral, 28-4-92, *G SA v. V SpA*, 118 II ATF 193 (1992); [1996] ECC 1, commented by Idot, (1993) *Rev.Arb.* 128. On remand, the defendant tried to argue that the arbitral tribunal had no longer jurisdiction, because of the involvement of the state court. The tribunal, however, considered that the Swiss Supreme Court's judgment had not affected the former's competence and rendered its award after duly taking into account the EC competition law question. See further Dimolita, "The Development and the Ensuing Misconceptions of *Kompetenz-Kompetenz* in Arbitration", 4 *Dikaio Epicheiriseon kai Etairion* 1181 (1998) [in Greek], p. 1184; *idem*, "Issues Concerning the Existence, Validity and Effectiveness of the Arbitration Agreement (Nullity of Main Contract, Arbitrability, Capacity, Concurrent Court Proceedings, Pre-arbitral Conditions Stipulated in Contract, Group of Companies)", 7(2) *ICC Bull.* 14 (1996), p. 21. This author views such cases as affecting not the existence or validity, but rather the effectiveness of the arbitration agreement. In other words, a plea alleging inarbitrability of the dispute aims at rendering inoperative the arbitration agreement in that specific context.

¹³⁷¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

arbitration was enforceable out of “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes”.¹³⁷² The dispute in that case involved territorial restrictions in an automobile distribution agreement. The distributor attempted to sell outside its assigned territory and refused to arbitrate as specified in the distribution agreement. Mitsubishi then sued to force arbitration. The distributor counter-claimed that his antitrust-based arguments were not arbitrable. The Court, however, adopted an extremely favourable position vis-à-vis international arbitration and reversed earlier rulings that had gone to the opposite direction.¹³⁷³

Thereafter the US Courts have been particularly arbitration-friendly and have actually extended this favourable attitude also to domestic arbitration.¹³⁷⁴ They have also considered that tort claims for damages based on the US antitrust law provisions could also be heard by arbitrators, if they are under the scope of the arbitration clause. The fact that antitrust law violations, especially horizontal cartels, may give rise to a multiplicity of complex damages claims should not be held against the arbitrability of such claims.¹³⁷⁵

As far as European countries are concerned, we can again note the same gradual shift from non-arbitrability to arbitrability. Continental systems, on their part, follow a variety of criteria to establish whether a dispute can be submitted to arbitration. Most countries follow a criterion based on the *free disposition of rights*. Under this criterion a dispute will be arbitrable if the rights at stake can be freely disposed of or settled by the parties. Most of these countries gradually accepted that competition law disputes and, more specifically, the civil consequences flowing from the prohibition rules of Articles 81 and 82 EC, could indeed be arbitrated, notwithstanding their public policy nature.¹³⁷⁶ In some other countries, notably

¹³⁷² *Ibid.*, at 629.

¹³⁷³ Compare e.g. *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968).

¹³⁷⁴ See e.g. *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724 ((11th Cir. 1996); *Seacoast Motors of Salisbury, Inc. v. Daimler-Chrysler Motors Corp.*, 271 F.3d 6 (1st Cir. 2001).

¹³⁷⁵ See e.g. *In re Currency Conversion Fee Antitrust Litigation*, 265 F.Supp.2d 385 (S.D.N.Y. 2003); *JLA Industries, Inc. et al. v. Stolt-Nielsen SA et al.*, 2004 US App. LEXIS 22253 (2d Cir. 2004); XXX YCA 963 (2005).

¹³⁷⁶ To give some examples, in Belgium Art. 1676 of Code of Civil Procedure permits the submission to arbitration of disputes that parties can freely dispose of. Questions pertaining to *ordre public* cannot be arbitrable. However, Belgian courts have made it clear that arbitrability is the rule and non-arbitrability the exception. Most problems in Belgium have concerned the notorious *Loi du 27 juillet 1961 sur la résiliation unilatérale des concessions de vente exclusive à durée indéterminée*. Initially, Belgian courts refused to accept the arbitrability of disputes pertaining to that law which contained mandatory norms for the protection of commercial agents in Belgium. Recent judgments of the Belgian *Cour de cassation* are more favourable to arbitration and in principle accept the arbitrability of such claims. See further Caprasse, “Ordre public sociétaire et arbitrage”, in: Poulet, Wéry & Wynants (Eds.), *Liber Amicorum Michel Coipel* (Bruxelles, 2004), p. 505. Belgium seems to follow the distinction between application of competition law *à titre incident* and *à titre principal*. Since Arts. 81 and 82 EC are considered provisions of public policy, arbitrators can deal with them

France, freedom of disposition remains a criterion but the law refers also to the *public policy nature* of non-arbitrable claims.¹³⁷⁷ Until the early 1990s, arbitrability of competition law disputes was not accepted by the courts. Thus, the arbitration clause would be void, if it touched upon a question of *ordre public* and EC competition law was considered of such a public policy character. This state of affairs had been criticised by many commentators, who stressed that the exclusion of any possibility of arbitration for all disputes touching upon EC competition law was rather excessive.¹³⁷⁸ The breakthrough took place in the *Labinal* and *Applix* cases of the Paris Court of Appeal,¹³⁷⁹ which clearly admitted for the first time the arbitrability of EC competition law disputes, albeit with some limitations.¹³⁸⁰ Germany and

only as subsidiary issue (*à titre incident*), while deciding on the civil consequences of the prohibition enshrined therein (nullity and damages claims). See Noïrfalisse, *supra* (1994), p. 80. On the other hand, arbitrators would not be competent to apply the Treaty competition rules as a main issue (*à titre principal*). This seems to exclude, therefore, the submission to arbitration of a declaratory claim concerning the application of Art. 81 or 82 EC to a given contract. In Greek law, which follows a similar free disposition criterion (Art. 867 of the Code of Civil Procedure), there has been no case where the issue of arbitrability of national or EC competition law disputes has arisen. The prevailing view in theory is, however, that the public policy character of those rules would not be an obstacle to the submission to arbitration of the civil law aspects of a dispute pertaining to competition law (nullity, contractual and non-contractual liability claims). On the other hand, the arbitrators cannot determine issues, with which the public authorities have been exclusively entrusted. See Koussoulis, "Procedural Issues Before the Competition Committee", in: Schinas (Ed.), *Protection of Free Competition, The Practice of EPA/EA* (Athens/Komotini, 1992) [in Greek], p. 298, fn. 30; Liakopoulos, "The Question of Private International Law in the Control of Concentrations", in: *The Control of Concentrations of Undertakings in Competition Law* (Athens, 1998) [in Greek], p. 42. Italian law has also progressed in a parallel way. Italy follows a free disposition criterion (Arts. 806 and 1966 of the Code of Civil Procedure) for the determination of the arbitrability of disputes. There too, it has recently been accepted that the public policy nature of the competition rules does not negate the disposition of rights based thereupon. See Corte di Cassazione, 21-8-96, n° 7733, *Telecolor SpA v. Technicolor SpA*, 47 Giust.Civ. I-1373 (1997), with a comment by Falvella, 47 Giust.Civ. I-1375 (1997). For earlier case law see Tribunale Bologna, 18-7-87, *COVEME SpA v. CFI - Compagnie Française des Isolants SA*, 23 Riv.Dir.Int.Priv.Proc. 740 (1987), which had considered invalid an arbitration clause in a restrictive agreement containing a non-competition clause because of the incompatibility with the mandatory rules of competition law (Art. 81 EC). See, however, the reversal of that finding on appeal in Corte d'Appello Bologna, 11-10-90, *COVEME SpA v. CFI - Compagnie Française des Isolants SA*, 3 Riv.Arbitrato 77 (1993), with comments by Rosi, 3 Riv.Arbitrato 79 (1993); Caporale, 7 Dir.Comm.Int. 725 (1993). In Spain, another country that adopts the free disposition criterion (see Mantilla-Serrano, "The New Spanish Arbitration Act", 21 Jint'l Arb. 367 (2004), pp. 370, 371), again arbitrability is seen quite favourably, which means that competition law disputes would be arbitrable. The same is accepted in Swedish law and in fact the Swedish Arbitration Act does not stop at the general provision of section 1(1) which refers to "disputes concerning matters in respect of which the parties may reach a settlement" but proceeds in paragraph (3) to a specific rule, according to which "arbitrators may rule on the civil law effects of competition law as between the parties".

¹³⁷⁷ Compare Arts. 2059 and 2060(1) *Code civil*.

¹³⁷⁸ See e.g. Loÿ, *supra* (1980), p. 451.

¹³⁷⁹ CA Paris, 19-5-93, *Labinal SA v. Mors and Westland Aerospace Ltd.*, (1993) Rev.Arb. 645, with a comment by Idot, (1993-7) *Europe* 10, 11; CA Paris, 14-10-93, *Sté Aplix v. Sté Vélcro*, (1994) Rev.Arb. 164, with a comment by Idot, (1994-4) *Europe* 12.

¹³⁸⁰ These were that arbitrators could not deal with issues, which were reserved to the Commission's or to public authorities' exclusive competence. Arbitrators could apply the civil consequences of the prohibitions of Arts. 81 and 82 EC, i.e. declare the nullity of agreements or other legal acts contravening these prohibitions, award damages and grant injunctions, preliminary or permanent. In other words, an arbitral tribunal was equated to a national court. Prohibition decisions, exemption decisions based upon Article 81(3) EC, and fines were outside the ambit of the tribunal's competence. Only the Commission and NCAs could deal with these issues. See Poillot-Peruzzetto and Luby, *supra* (1998), p. 255; Putman *supra* (1998), p. 407; Gavalda and Parleani, *supra* (2002), p. 276.

Austria, on the other hand, follow an arbitrability criterion based on the *economic nature* of the dispute.¹³⁸¹ This criterion is more amenable to the arbitrability of the competition rules. Indeed, in German law, competition law-related disputes have generally been considered arbitrable.¹³⁸²

In England finally, where until recently there was no case law on this question, the English High Court dispelled any doubts about the arbitrability of the Treaty competition law provisions and indeed considered that “there is no realistic doubt that ... ‘competition’ or ‘anti-trust’ claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction”.¹³⁸³ Following an analysis of the wording of the arbitration clause in that case, the court concluded that it covered any potential disputes concerning the performance or non-performance or interpretation of the contracts and, as such, included antitrust claims, even if the latter were said to be of a tortious nature. A stay of the proceedings was granted and the court confirmed that these claims should also be heard by the arbitral tribunal.

This expansion of arbitrability to cover also tortious claims arising out of the violation of the competition rules, echoes a more general trend in recent arbitration statutes as well as in Article 7(1) of the UNCITRAL Model Law not to define arbitrable disputes by reference to specific contracts, thus restricting arbitrability to contractual claims, but rather to define such disputes by reference to legal relationships, thus leaving arbitrability open also for claims that are not *stricto sensu* contractual, but can be formally characterised as tortious, restitutionary or otherwise.¹³⁸⁴ Thus, with regard to tort claims, it is increasingly accepted that there is no compelling reason to exclude arbitrability, if the arbitration clause is wide enough to cover such claims.¹³⁸⁵ The arbitration practice indeed supports this.¹³⁸⁶

¹³⁸¹ See Arts. 1030(1) and 582 of the German and Austrian Codes of Civil Procedure, respectively.

¹³⁸² See K.H. Schwab and G. Walter, *Schiedsgerichtsbarkeit, Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (München, 2005), p. 32. It is noteworthy that the old s. 91 GWB that imposed severe limitations on the arbitrability of the German antitrust provisions was abandoned in 1998, although that provision had never meant the complete non-arbitrability of disputes that touched upon questions of German competition law.

¹³⁸³ *ET Plus S.A. & Ors v. Welter & Ors* (Comm.), [2006] Lloyd's Rep. 251; [2005] EWHC 2115, para. 51.

¹³⁸⁴ See Kreindler, “Arbitral Forum Shopping”, in: Cremades & Lew (Eds.), *Parallel State and Arbitral Procedures in International Arbitration* (Paris, 2005).

¹³⁸⁵ See e.g. Fouchard, Gaillard, Goldman, *supra* (1999), pp. 306-307; J.-F. Poudret and S. Besson, *Droit comparé de l'arbitrage international* (Zurich/Bâle/Genève, 2002), p. 282.

¹³⁸⁶ See e.g. the partial award in case ICC 12363/ACS, 24 Bull.ASA 462 (2006).

From this analysis, it is evident that the arbitrability of EC competition law is no longer questioned and should be taken as granted.¹³⁸⁷ It is noteworthy finally to stress that the 1999 *Eco Swiss* ruling of the Court of Justice¹³⁸⁸ by implication is also supportive of the proposition that EC competition law issues are arbitrable. The Court, by deciding on the duties of national courts to safeguard the effectiveness of EC competition law and to refuse to recognise or to set aside arbitral awards that offend against the public policy (*ordre public*), as this is expressed by these rules, implicitly ruled on the arbitrability of those rules.

b. Competences of Arbitrators in the Decentralised System of Enforcement

aa. Modalities of EC Competition Law Issues Arising in Arbitration

Arbitrators usually come across competition law issues in an incidental way. In most cases there will be a contractual dispute and the competition law question will be raised as a defence by the defendant. The contract - typically a distribution, licensing or co-operation agreement - will contain an arbitration clause and the plaintiff will advance claims based on breach of contract, while the defendant will raise the nullity of the contract or of certain parts of it.

One cannot exclude, however, the possibility that EC competition law could also be pleaded as a sword before arbitrators in a contractual law dispute. This could happen in case of a co-contractor's damages claim because of harm incurred through his counter-party's violation of the competition rules or in a similar case involving a member of an illegal cartel and his direct purchasers.¹³⁸⁹ In most of these rather rare cases, typically, there will be a pre-existing arbitration clause (*clause compromissoire*). On the other hand, it is rare to see a non-contractual liability case be decided by arbitrators, if there is not yet any arbitration clause, since it would be almost impossible for the involved persons to conclude an arbitration agreement after the dispute has arisen (*compromis*).

¹³⁸⁷ On the arbitrability of the Community rules on state aids and on the possible application of Art. 88(3) EC by arbitrators see Slot, *supra* (1996), p. 110 *et seq.*; Lenaerts and Pittie, "Conclusions générales", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997), p. 196. Naturally, arbitrators, like national courts, have no jurisdiction to determine the compatibility of state aid measures or of a state aid scheme with the common market. That assessment falls within the exclusive competence of the Commission, subject to review by the Community judicature. See e.g. Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori*, [2006] ECR I-2941, para. 71.

¹³⁸⁸ Cited above. For a full analysis of that case and its meaning for arbitration, see below.

¹³⁸⁹ Compare, for example, the US *Stolt Nielsen* case (cited *supra*).

In sum, the way a competition law-related dispute arises before the arbitrators bears no difference at all from the way it comes before the courts.

bb. The Full Power of Arbitrators to Apply Article 81(3) EC

At this point, we should examine the role of arbitrators in the new system of decentralised enforcement introduced by Regulation 1/2003. The first point to be made here is that Regulation 1/2003 does not mention arbitration. This should not come as a surprise, as state laws do not normally contain individual rules on the arbitrability of every single dispute but rather rely on generalised criteria, as we have just described above. Some degree of surprise, however, might be justified with regard to the total absence of any reference to arbitration in the other numerous texts that have foreshadowed and later accompanied Regulation 1/2003.¹³⁹⁰

On another occasion,¹³⁹¹ we have argued that the silence about arbitration during the modernisation debate was probably a conscious and prudent choice on the part of the Commission, which had already been extremely bold in its proposals and would not have liked to imperil their chances of realisation by adding up further points of a certain controversy. If the Commission's proposal to allow national courts to apply Article 81(3) EC was one of the points that attracted the staunchest criticism,¹³⁹² the application of that provision by arbitrators must have seemed in those days an even more sensitive matter.

Until 1 May 2004, arbitrators had been applying Articles 81 and 82 EC on numerous occasions, although, like national judges, they did not have jurisdiction to apply Article 81(3) EC,¹³⁹³ which pursuant to Article 9(1) of Regulation 17/1962 was reserved to the sole power of the Commission to apply. There is no doubt that with the abolition of this Commission enforcement monopoly, like state judges, arbitrators are now able to apply the third paragraph of Article 81 EC, too.¹³⁹⁴

¹³⁹⁰ Before the Commission started envisaging the White Paper reforms, it had commissioned a study on the application of the then Arts. 85 and 86 of the Treaty by national courts in the Member States. The study, co-ordinated by August Braakman and foreworded by the then DG IV Commissioner Van Miert, was composed of national reports, which included whole chapters on arbitration, as a separate *forum* for the application of Arts. 81 and 82 EC. See European Commission, DG IV-Competition, *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States* (Brussels, 1997). This is quite a contrast with the subsequent silence of the Commission during the modernisation debates.

¹³⁹¹ See Komninos, *supra* (2001), p. 218.

¹³⁹² See above.

¹³⁹³ In other words, Art. 81(3) was not arbitrable under the Reg. 17/1962 enforcement system.

¹³⁹⁴ See also Burrichter, *supra* (2001), p. 543; Komninos, *supra* (2001), p. 219 *et seq.*; Idot, *supra* (2003a), pp. 316-317; Idot, *supra* (2003c), p. 11.

This is, however, a principle that may require some further analysis. It is noteworthy that the text of Article 6 of the initial regulation proposal of 2000¹³⁹⁵ had created some doubts, because it sounded too exclusive, as if a prerogative that was so far only in the hands of the Commission was to be shared with the national courts and only with them. It read as follows: “National courts before which the prohibition in Article 81(1) of the Treaty is invoked *shall also have jurisdiction to apply Article 81(3)*”.¹³⁹⁶ We have referred above to the criticism of the choice of the regulation proposal text to remain in the “jurisdiction” language, rather than to emphasise the shift to a system of legal exception that results in all enforcers being able to apply Article 81 EC as a whole. This had created the impression of exclusivity, i.e. that only national courts by means of “delegation” could apply the third paragraph of that provision, in addition to national competition authorities. Under such a reading, it would have seemed that arbitrators were left out of the application of Article 81(3) EC.

The new text of Article 6 of Regulation 1/2003, however, does not include the word “also”, which existed in the draft regulation and which gave the impression of a certain exclusivity. The new text also adopted the more correct language that “national courts shall have the power to apply Articles 81 and 82 of the Treaty”. The latter point is very important for arbitration. An “exclusive” interpretation allowing *only* national competition authorities and courts to apply Article 81(3) EC would miss the whole point of the reforms and would not be in conformity with a historical and systematic interpretation of the Regulation. The basic ratio is to align the enforcement of the third paragraph of Article 81 EC to that of the first one, so that this provision can be applied as a whole by the same enforcer or in the same forum.

The fact that no reference is made in the Regulation to arbitration should not be taken as exclusionary of arbitrators’ jurisdiction to apply Article 81(3) EC.¹³⁹⁷ Arbitrators applied under the old system the first two paragraphs of that provision, without having been authorised to do so under any provision of EC competition law.¹³⁹⁸ Their jurisdiction to do so is well established and it has been confirmed by national courts and by implication by the Court of Justice alike.¹³⁹⁹ If there was an intension for some reason to bar arbitrators from applying Article 81(3) EC, an express provision would undoubtedly have been included to

¹³⁹⁵ See above.

¹³⁹⁶ Emphasis added.

¹³⁹⁷ Indeed, the text of the Regulation should also not be taken as exclusionary of non-EU courts, notwithstanding its reference to *national* courts.

¹³⁹⁸ As mentioned above, the arbitrability of a dispute referring to a certain legal norm is rarely expressly authorised or prohibited by that norm itself, although the granting of exclusive powers of enforcement to a particular body may explicitly deny those powers to arbitrators.

¹³⁹⁹ See e.g. cases C-393/92, *Gemeente Almelo et al. v. Energiebedrijf IJsselmij NV*, [1994] ECR I-1477 and *Eco Swiss, op.cit.*, which will be analysed below.

this end. By not having done so and by emphasising the fact that Article 81 EC will be applied as a whole, the new Regulation has accepted that possibility.¹⁴⁰⁰

Any other solution would create serious problems of a procedural nature: Under the administrative authorisation system, when there was an on-going litigation or arbitration and the possibility of an Article 81(3) EC individual exemption arose, the courts or arbitral tribunals were barred from rendering themselves such a constitutive decision and suspended their proceedings, so that the agreement in question could be considered for an exemption by the Commission, which was the only competent authority to take such a decision. But with the adoption of a system of legal exception, when arbitrators are called to deal with that provision, they simply have to apply it themselves. Even if they could somehow separate paragraph (3) out of Article 81 EC, which is no longer possible since Article 81 EC must now be applied as a procedurally integrated norm, the question would arise as to whom they would have to send the issue to be decided. Certainly not to the Commission, since the latter would no longer have jurisdiction to give an individual exemption, neither to the European Court of Justice, since the latter ever since the ruling in *Nordsee*,¹⁴⁰¹ lately confirmed in *Eco Swiss*, cannot accept preliminary references from arbitrators. Thus, they would have no other option but to send this specific issue to national courts. However, it is no longer possible or meaningful for a court to issue a separate decision of exemption or declaration of applicability of Article 81(3) EC, other than to apply Article 81 EC as a whole. That, however, would have led to a retrogression and would strip arbitrators of their established competence to apply Article 81(1)(2) EC.

Leaving aside any legal arguments as to the applicability of Article 81(3) EC by arbitral tribunals, one may wonder about the ability of arbitrators to get involved in such questions, so utterly connected with economic public policy and so prone to complex economic deliberations. If courts have now been accepted as full enforcers of Articles 81 and 82 EC, it would be contradictory to treat arbitrators in a different way. Indeed, what can be held against courts, basically that they usually lack the expertise that would allow them to address the complex economic issues involved, may be one of the winning points of arbitration. Parties may and usually do select as arbitrators persons with a high level of expertise, thus minimising any risks owed to the judge's possibly limited knowledge of a highly technical

¹⁴⁰⁰ See in this sense Edward, "The Modernisation of EC Antitrust Policy: Issues for Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 569; Komninos, *supra* (2001), p. 221.

¹⁴⁰¹ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095.

field. At the same time, the increased flexibility of the arbitral procedure, in comparison to that of state justice, suits well antitrust, whose substance might sometimes be at pains with the straitjacket of a national code of civil procedure. This is particularly true of national rules of evidence, which can be quite a hurdle for an antitrust case in national courts, as opposed to arbitral tribunals, which may avail themselves of much more extensive powers of discovery.¹⁴⁰² Indeed, there is anecdotal evidence that arbitrators, even before the introduction of the legal exception system, have on some occasions felt quite at ease to base their awards on considerations pertaining to Article 81(3) EC, thus positively applying this provision “by the back door”.¹⁴⁰³

In sum, the recent procedural reforms and the introduction of the legal exception system have reinforced that proposition and have removed the only area where the Commission had exclusive competence, i.e. Article 81(3) EC. Arbitrators, exactly as state courts enjoy now the power to apply Articles 81 and 82 EC in full.¹⁴⁰⁴ The only remaining area which is not open to arbitration, in the same way as it is not open to state courts, is the withdrawal of the benefit of a block exemption. However, as we have explained, above, this is in reality a public prerogative, entrusted to public authorities, and has nothing to do with dispute resolution. In that sense, it is not even correct to speak of inarbitrability.

4. The Institutional Position of Arbitration in EC Competition Law Enforcement

a. Arbitration and European Court of Justice

aa. Direct Preliminary References: The *Nordsee* Obstacle

Since Community law is primarily applied in a decentralised manner, by national authorities and courts, the uniformity element is of particular importance to its development.¹⁴⁰⁵ With

¹⁴⁰² See Temple Lang, “Panel Discussion: International Arbitration”, in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 421 *et seq.* A certain weakness of arbitration exists as to third-party evidence. The latter can be usually obtained through the intervention of state courts (see below). On discovery in arbitration in general see Derains, “La pratique de l’administration de la preuve dans l’arbitrage commercial international”, (2004) *Rev.Arb.* 781.

¹⁴⁰³ See Fox, “Panel Discussion: EC Competition System: Proposals for Reform”, in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999), p. 228. Such arbitral awards would of course have been liable to annulment/non-recognition for having dealt with non-arbitrable issues.

¹⁴⁰⁴ On this question see the analysis below.

¹⁴⁰⁵ See Christianos, *supra* (1998), p. 98; Fines, *supra* (2004), p. 333 *et seq.*; Louis and Ronse, *supra* (2005), p. 262.

reference to national courts, this necessity is served by Article 234 EC. The system introduced by this provision is not hierarchical, but rather one of judicial co-operation, where each layer exercises its own jurisdiction.¹⁴⁰⁶ Joseph Weiler was writing back in 1981 that the concept of uniformity, which is a dominant feature of the European Communities is found “substantively, in the notion of one market, and, procedurally, in Article [234] of the Treaty”.¹⁴⁰⁷ Indeed, the preliminary reference procedure of Article 234 EC has been the great success story of Community law and is by far the most efficient mechanism for encouraging national courts to apply Community law, providing at the same time for them assistance in the interpretation of that law. The preliminary reference mechanism is also the most important tool for the EU citizen’s access to the Court of Justice.¹⁴⁰⁸

In the course of the last twenty years the Court’s case law has shifted and the conditions for the admissibility of preliminary references are sometimes interpreted rather restrictively. This should be seen as a sign of maturity. We can distinguish cases of objective from cases of subjective inadmissibility. Objective inadmissibility refers to situations where the preliminary reference itself and the questions that the national court refers to Luxembourg are not considered adequate for the European Court of Justice to rule upon. This is usually the case when the national court does not explain why the case at issue necessitates a preliminary reference and why Community law is implicated. There are many examples of references, often coming from lower courts, which essentially lack the quality expected in order to have a meaningful dialogue between the Community and the national judge. The Court has invariably considered such references as inadmissible.¹⁴⁰⁹

At the same time, the Court of Justice has laid down specific conditions for subjective admissibility. Thus, there has been a rather rich case law with regard to the notion of “a court or tribunal” that is entitled or obliged to address preliminary references under Article 234 EC, this being a question subject to Community law. It is true that the Court of Justice has followed a quite generous approach and has interpreted that criterion broadly, with a view to safeguarding the uniform and effective application of Community law, as well as the

¹⁴⁰⁶ See P.J.G. Kapteyn, P. VerLoren van Themaat, L.A. Geelhoed, and L.W. Gormley, *Introduction to the Law of the European Communities, From Maastricht to Amsterdam* (London/The Hague/Boston, 1998), p. 503 *et seq.*; M.K. Vilaras, *Effective Protection of Community Rights by National Courts* (Athens/Komotini, 2000) [in Greek], pp. 15-16.

¹⁴⁰⁷ See Weiler, “The Community System: The Dual Character of Supranationalism”, 1 YEL 267 (1981), p. 293. See also Louis and Ronse, *supra*, p. 73 *et seq.*

¹⁴⁰⁸ See W. Hakenberg and C. Stix-Hackl, *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*, Vol. I (Wien, 2005), p. 63.

¹⁴⁰⁹ See e.g. case 244/80, *Pasquale Foglia v. Mariella Novello, Magliano Alfieri (II)*, [1981] ECR 3045; and most recently, *Provvidenza Regio*, *op.cit.*

effectiveness of the judicial protection of the Community citizen, thus sacrificing up to a certain extent the “form”. As it has been pointed out, the Court “widens the franchise of Community law: by making the preliminary reference procedure available to as wide a category of bodies as possible, it upholds Community rights at the lower level and increases their immediacy and resonance”.¹⁴¹⁰ In order to do this, the Court takes into account a series of elements: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory,¹⁴¹¹ whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.¹⁴¹² Furthermore, a body may refer a question to the Court of Justice “only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature”.¹⁴¹³ This list is not an all-inclusive one, neither are these elements absolute, and it happens that other criteria, such as the *res judicata* effect of the decisions of the referring body, may play a role.

Arbitrators, however, have not been considered eligible under the above criteria. While the Court has sometimes entertained preliminary references from regulatory bodies termed as “arbitration tribunals”, whose jurisdiction is in most cases compulsory,¹⁴¹⁴ it has nevertheless not admitted references from the kind of arbitration bodies that we deal here with, i.e. private commercial arbitration tribunals. Such tribunals, ever since the Court’s *Nordsee* ruling,¹⁴¹⁵ do not constitute “courts or tribunals of a Member State” in the sense of Article 234 EC and this jurisprudence is very unlikely to be reversed in the future.¹⁴¹⁶ Indeed, very recently the Court restated its refusal to accept such references in *Denuit*.¹⁴¹⁷

In *Nordsee*, the Court acknowledged that an arbitral tribunal deciding private disputes has many similarities with state courts, in respect of the fact that arbitration is provided for within the framework of the law (national civil procedural laws), in that it decides according to law

¹⁴¹⁰ See Tridimas, *supra* (2003), p. 30.

¹⁴¹¹ Compulsory in the sense that the parties must be required *ex lege* or even sometimes *de facto* to submit their disputes to it. See K. Lenaerts and D. Arts, *Procedural Law of the European Union* (London, 1999), p. 20.

¹⁴¹² Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, [1997] ECR I-4961, para. 23.

¹⁴¹³ Case C-134/97, *Victoria Film AS*, [1998] ECR I-7023, para. 14; case C-195/98, *Österreichischer Gewerkschaftsbund and Gewerkschaft öffentlicher Dienst v. Austria*, [2000] ECR I-1049, para. 25; case C-53/03, *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) et al. v. GlaxoSmithKline plc. and GlaxoSmithKline AEBE*, [2005] ECR I-4609, para. 35.

¹⁴¹⁴ See e.g. case 61/65, *G. Vaassen (née Göbbels) v. Management of the Beambtenfonds voor het Mijnbedrijf*, [1966] ECR 261; case 246/80, *C. Broekmeulen v. Huisarts Registratie Commissie*, [1981] ECR 2311.

¹⁴¹⁵ Cited *supra*.

¹⁴¹⁶ See Lord Mackenzie-Stuart, “Arbitration and the Court of Justice of the European Communities”, 4(1) ICC Bull. 51 (1993), p. 52; Van Gerven, “L’arbitrage dans le droit européen”, 72 RDIDC 67 (1995), p. 73.

¹⁴¹⁷ Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages and Culture S.A.*, [2005] ECR I-923.

and its award enjoys *res judicata* as between the parties. However, those characteristics were not sufficient to give it the status of a “court or tribunal of a Member State” in the meaning of Article 234 EC.¹⁴¹⁸ Since recourse to arbitration is normally freely decided by the parties and the Member States are not involved in their decision, nor are they entitled to intervene automatically in the arbitral proceedings, it follows that the link between the arbitration procedure and the organisation of legal remedies in the Member State concerned is not sufficiently close so as to make preliminary references under Article 234 EC admissible.¹⁴¹⁹

Nevertheless, the Court of Justice, accepting that arbitration covers a wide spectrum of the commercial activity, recognised that it would not be proper to deny any access whatsoever to arbitral tribunals dealing with disputes that involve an EC law issue. Such access could be indirect through the intervention of national courts. The latter in the context of their powers of supervision and review over arbitral proceedings and awards may examine those questions and ascertain whether it is necessary for them to make a reference to the Court under Article 234 EC.¹⁴²⁰

The *Nordsee* ruling has been criticised severely in the past and continues to be so at present. In particular, it has been argued that the restrictive attitude of the Court in the interpretation of the “court or tribunal” criterion of Article 234 EC is not in conformity with a more general positive treatment of arbitration and of other forms of alternative disputes resolution (ADR) by Community law.¹⁴²¹ The Court of Justice, by excluding arbitrators from the Article 234 EC mechanism, has essentially excluded the influence that Community law can exert over a wide area of commercial disputes.¹⁴²² Within that area, the argument goes, the effectiveness of the principle of uniformity of interpretation of Community rules is weakened.¹⁴²³ Then, there are Member States where arbitration is particularly developed and a great number of commercial disputes are submitted to it, certainly much more than is the case in other Member States. Some commentators have stressed this discriminatory effect of the *Nordsee* jurisprudence and have stressed the risk of a lesser degree of uniformity and effectiveness of

¹⁴¹⁸ *Nordsee*, *op.cit.*, para. 10.

¹⁴¹⁹ *Ibid*, paras. 11-13.

¹⁴²⁰ *Ibid*, paras. 14-15.

¹⁴²¹ See e.g. Edward, *supra* (2001), p. 569.

¹⁴²² See Steindorff, “Panel Discussion: EEC Competition Law from the Perspective of the Court of Justice”, in: Hawk (Ed.), *Antitrust and Trade Policy in the United States and the European Community 1985, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1986), p. 443.

¹⁴²³ See G. Gaja, *Introduzione al diritto comunitario* (Bari, 2000), p. 60.

Community law in those Member States where arbitrators decide an increasing number of disputes, yet cannot seek the Court of Justice's authoritative interpretation of the EC rules.¹⁴²⁴ Besides, the alternative routes for an arbitration case to reach Luxembourg through the intervention of national courts, as suggested by the Court of Justice in *Nordsee*, are criticised as inappropriate, since they cause delay and more expenses. These routes seem also wrongly to assume a high degree of control exercised by state courts over arbitration proceedings and awards, which is, however, not the case in modern times.¹⁴²⁵ Then the vast majority of arbitral awards are not contested by the parties and, therefore, the state courts will very rarely have the opportunity to intervene and seize the Court of Justice with a preliminary reference.¹⁴²⁶

Perhaps the most problematic situation that arises as a result of the arbitrators' inability to seize the Court of Justice with a preliminary reference is where the arbitrators entertain very serious doubts as to the legality of a Community measure, for example a Commission decision. In such situations, they are definitely under a intractable comparative disadvantage vis-à-vis courts, because clearly they have no other option but to consider the Commission measure as valid. The Court of Justice has stressed that it is only national courts of the EU Member States that have the power to grant interim measures and possibly to suspend the application of the Community measure as to the parties before their proceedings, while being bound at the same time to address a relevant preliminary question on that measure's validity to Luxembourg.¹⁴²⁷

It is not our purpose to revisit the arguments in favour of or against the admissibility of preliminary references of arbitrators. In our view there were two basic concerns that led the Court to favour inadmissibility. One concern must certainly have been the "floodgates argument".¹⁴²⁸ As the Court of Justice continues to be overburdened, particularly with preliminary references by national courts, this concern is as present as ever. The second

¹⁴²⁴ See e.g. P.D. Dagoglou, *European Community Law*, Vol. I (Athens, 1985) [in Greek], pp. 433-434, with reference to Greece.

¹⁴²⁵ See e.g. Kaissis, "Europarecht und Schiedsgerichtsbarkeit: Ein Überblick über die Rechtsprechung des EuGH zu Fragen der Schiedsgerichtsbarkeit", in: Kaissis & Mavromatis (Eds.), *Advantages of Arbitration in Greece and Balkan Countries* (Thessaloniki, 1999), p. 121.

¹⁴²⁶ See e.g. the critique of Baudenbacher, "Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions", in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 444.

¹⁴²⁷ *Foto-Frost*, *op.cit.*, para. 13 *et seq.*

¹⁴²⁸ See e.g. Kaissis, *supra* (1999), p. 121; Van Gerven, *supra* (1995), p. 72; *idem*, "Panel Three Discussion: Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), pp. 297-298. See also AG Reischl's Opinion: "... one must reflect the risk that the Court of Justice would be burdened with a work-load the extent of which would be difficult to estimate if it were to be thus diverted from its own work to deal with private disputes, often of very minor significance, involving some aspects of Community law" (*Nordsee*, *op.cit.*, AG's Opinion, at 1122).

concern and one of the fundamental grounds on which the Court relied in order to deny access to arbitrators was the absence of a close link between arbitration and the power and authority of a state, that can guarantee that the ruling of the Court will bind the national courts and will not be merely advisory¹⁴²⁹ and that the Article 234 EC procedure will not be abused by arbitrators or parties in arbitral proceedings. The fact that *Nordsee* was decided shortly after *Foglia v. Novello*¹⁴³⁰ has not been missed by commentators.¹⁴³¹ As Lenaerts and Arts note, “by declining jurisdiction to answer questions referred for a preliminary ruling by arbitrators, the Court sought to prevent contracting parties from creating ‘courts and tribunals’ of their own and subsequently inducing (obliging) them to seek preliminary rulings”, since “in the Court’s view this mechanism would be endangered if parties to a contract could circumvent it by setting up an arbitration board whose organisation is in no way based on action on the part of the public authorities and which is not recognised as the obligatory legal authority for dealing with a particular class of disputes”.¹⁴³²

This argument can be further developed by reference to Article 10 EC. It may be submitted that there is a inherent link between Articles 10 and 234 EC. Indeed, Article 234 EC through the preliminary reference procedure provides for a judicial co-operation between national and Community judiciaries, which is part of the more general principle of loyal co-operation between the Community and the Member States, as enshrined in Article 10 EC.¹⁴³³ In that sense Article 234 EC is a form of *lex specialis* of Article 10 EC.¹⁴³⁴ According to the system of the EC Treaty and to Articles 10 and 234 EC, the Member States remain the ultimate

¹⁴²⁹ The Court has stressed on numerous occasions that it cannot give advisory opinions and that its preliminary rulings bind the national courts to which they are addressed. See e.g. case C-346/93, *Kleinwort Benson Ltd. v. City of Glasgow City Council*, [1995] ECR I-615, para. 24, where the Court of Justice declined jurisdiction over a preliminary reference by an English court on the interpretation of the 1982 Civil Jurisdiction and Judgments Act, which was modelled on the 1968 Brussels Convention and determined the jurisdiction of intra-UK courts. According to the Court, the referring court was not clearly bound in that case to follow the preliminary ruling.

¹⁴³⁰ Cited *supra*.

¹⁴³¹ See Hepting, “Art. 177 EWGV und die private Schiedsgerichtsbarkeit”, 17 EuR 315 (1982), pp. 328-329.

¹⁴³² See Lenaerts and Arts, *supra* (1999), p. 24.

¹⁴³³ See e.g. N. Skandamis, *European Law*, Vol. I, *Institutions of the European Union*, No. 4, *Organic Constitution of the European Union* (Athens/Komotini, 2003) [in Greek], p. 210. Indeed, it can be argued that the principle of loyal co-operation enshrined in Art. 10 EC is an inherent general principle of law in the supranational context of the Community and of the European Union. According to AG Kokott’s Opinion in case C-105/03, *Criminal proceedings against Maria Pupino*, [2005] ECR I-5285, para. 24, the fact that the TEU contained no equivalent provision to Art. 10 EC did not mean that the principle of loyal co-operation did not bind Member States vis-à-vis the Union. In other words this is a more general principle of law.

¹⁴³⁴ In this direction A. Raclet, *Droit communautaire des affaires et prérogatives de puissance publique nationales* (Paris, 2002), p. 130, M.P. Chiti, *Diritto amministrativo europeo* (Milano, 2004), p. 576. See also para. 84 of AG Lenz’s Opinion in cases 143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, [1991] ECR I-415, making the Art. 10 EC - 234 EC link point.

interlocutors of the Community with regard to the enforcement of Community law in their territory and bear the sole responsibility for discharging Community law duties. Thus, the Member States and - in our context - their judicial organs are also responsible for the conduct of private parties, when the latter interfere with the enforcement of Community law inside the territory of the latter.¹⁴³⁵

Furthermore, the legitimacy of a body to seize the Court of Justice with a preliminary reference entails that Community law binds the former through Article 10 EC and that ultimately a Member State becomes answerable under EC law for the conduct of such bodies.¹⁴³⁶ Thus, the referring body is bound to follow the ruling of the Court of Justice.¹⁴³⁷ It would be difficult to reach the same result, if arbitrators were to be granted access to address preliminary references to Luxembourg, since, formally speaking, the former would not be bound to follow the Article 234 EC ruling. In addition, Article 10 EC imposes certain duties on national courts with the ultimate aim to guarantee the effective judicial protection of individuals and the uniformity of application and interpretation of Community law through the Article 234 EC procedure. Thus, in *Peterbroeck* and *Eco Swiss* national courts were by virtue of Article 10 EC under a duty to raise Community law questions even *ex officio* even at a late point in the proceedings, in order to proceed to a preliminary reference to the Court of Justice, because the first instance body did not qualify to do so itself.

The problem with arbitration is that the duty of co-operation in Article 10 EC is limited only to Community institutions and to official authorities and organs of the Member States. Arbitrators do not fall under this provision,¹⁴³⁸ since, although enjoying jurisdictional and quasi-judicial powers, they still remain a creation of private autonomy. In this respect they cannot directly bind the Member State in which they sit. Such a responsibility of the Member

¹⁴³⁵ That there is such a connection between Arts. 10 and 234 EC can also be adduced from the letter of *Nordsee*: "the Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with..." (*Nordsee*, *op.cit.*, para. 12, emphasis added). See further on this issue Dagoglou, *supra* (1985), p. 432; Lenaerts and Pittie, *supra* (1997), p. 209; Raclet, *supra* (2002), p. 44. In this context, it is also interesting to note that one of the most important duties flowing from Art. 10 EC, the duty to interpret national law in conformity with Community law, binds national courts only with regard to the interpretation of *their own national laws* and not with regard to the interpretation of *other EU Member States' national laws* that may in *casu* be applicable pursuant to a choice-of-law clause or under the conflict of laws rules of the forum. The link between the state that is answerable for Community law purposes and its organs is clear in this case. See on this interesting question Roth, "Die richtlinienkonforme Auslegung", 16 EWS 385 (2005), p. 386.

¹⁴³⁶ See case note by Van Haersolte-van Hof, 6 Am.Rev.Int'l Arb. 83 (1995), p. 85; Auletta, "Le questioni incidentali", in: Verde (Ed.), *Diritto dell'arbitrato rituale* (Torino, 1997), pp. 203-204.

¹⁴³⁷ See on this binding effect, Synodinos, "Aspects of Supremacy of Community Directives over National Law and Relevant Powers of National Courts", 48 *Epitheorisi Emporikou Dikaïou* 612 (1997) [in Greek], p. 629.

¹⁴³⁸ See Van Gerven, *supra* (1995), p. 71 *et seq.*; Slot, *supra* (1996), p. 105.

States can only be indirect through their courts, which on their turn must exercise a certain control over arbitral proceedings and awards taking into account Community law requirements. Being bound by Article 10 EC to ensure the effectiveness of Community law, they are precluded from enforcing arbitral awards which are manifestly contrary to Community rules of public policy.¹⁴³⁹

bb. A Tempering of *Nordsee*?

Ever since *Nordsee*, it has been submitted that the Court of Justice should reconsider its ruling¹⁴⁴⁰ by attributing more weight to the fact that arbitrators *do apply* and, indeed, under certain circumstances *are under a duty to apply* EC competition law, as directly effective provisions of Community law, which form part of national law. As the Court itself emphasised in *Nordsee*, "Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not free to create exceptions to it".¹⁴⁴¹ Therefore, the argument goes, since arbitral tribunals must apply Community (competition) law, it is to that extent that they should also have access to the preliminary reference procedure.¹⁴⁴² In other words, a criterion for the admissibility of such references would not just be the nature of the referring body, but also its obligation to apply EC law.¹⁴⁴³

¹⁴³⁹ Already before *Eco Swiss*, see Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty", 27 CMLRev. 645 (1990), p. 649.

¹⁴⁴⁰ It has also been suggested that a new opportunity for arbitrators to directly seize the Community judicial organs may be offered by the Treaty of Nice. According to Art. 225(3) EC, as amended by the Treaty of Nice, the CFI may have jurisdiction in the future to hear Art. 234 EC preliminary references in specific areas laid down by the ECJ Statute. Competition law is one of the areas under consideration. According to one commentator this might provide an opportunity for giving arbitrators the right to address such preliminary questions to the CFI rather than to the ECJ. See Baudenbacher, "Enforcement of EC Competition Rules by Arbitration Tribunals outside the EU", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 360; *idem*, "Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions", in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 444. However, we fail to see how the CFI could depart from the standard jurisprudence of the ECJ with regard to the criterion of a "court or tribunal" under Art. 234 EC. Article 225(3) EC does not introduce a distinctive new preliminary reference procedure before the CFI. Rather, it refers to Art. 234 EC, which remains the applicable Treaty provision that governs that procedure. This means that the CFI would have to adhere to the interpretation given to that provision by the ECJ in earlier cases.

¹⁴⁴¹ *Nordsee*, *op.cit.*, para. 14. See also Broekmeulen, *op.cit.*, para. 16, according to which "it is incumbent upon Member States to take the necessary steps to ensure that within their own territory the provisions adopted by the Community institutions are implemented in their entirety".

¹⁴⁴² See among others Bebr, "Arbitration Tribunals and Article 177 of the EEC Treaty", 22 CMLRev. 489 (1985), pp. 497-498; Kornblum, "Private Schiedsgerichte und Art. 177 EWGV", 2 JPS 102 (1988), pp. 109-110; K.P. Berger, *International Economic Arbitration, Studies in Transnational Economic Law*, Vol. IX (Deventer/Boston, 1993), p. 454; Weigand, "Evading EC Competition Law by Resorting to Arbitration?", 9 Arb.Int'l 249 (1993), p. 253.

¹⁴⁴³ See J.-B. Racine, *L'arbitrage commercial international et l'ordre public* (Paris, 1999), p. 264.

A more advanced argument of the same nature, albeit taking into account the *Eco Swiss* case and its implications, has been put forward by professor Jürgen Basedow.¹⁴⁴⁴ According to this view, since the Court of Justice recognised that arbitral awards in violation of the Treaty competition rules could be set aside or refused recognition or enforcement as contrary to public policy, thus *de facto* introducing a duty on arbitrators to respect such rules,¹⁴⁴⁵ conversely, the former should also be able conversely to hear preliminary references from arbitrators in those particular cases where *ordre public* comes into play.¹⁴⁴⁶

With all due respect, it is difficult to use as a criterion for the admissibility of references by arbitrators *during the course* of arbitral proceedings the likelihood of a public policy violation, since the latter will be decided by the national courts on an *ad hoc* basis at a much later point, *after the end* of the arbitration process. Then another problem is that the whole preliminary reference procedure is too rigid to accommodate the necessary discretion that this proposal entails for the Court of Justice's admission of preliminary references. There would have to be a preliminary *prima facie* examination on its part that there is a valid case pertaining to *ordre public*, before the reference could be admitted, thus introducing a sort of *certiorari*, which the Court currently does not enjoy.

Additionally, in practice there may be no real necessity to proceed in such a tempering of *Nordsee*. The prevailing view considers that there has to be a certain degree of seriousness of the infraction of EC competition law, in order for an arbitral award to be considered offensive to *ordre public* and to be set aside or refused enforcement.¹⁴⁴⁷ A complete disregard or unawareness of that law by the arbitrators is certainly objectionable, even if non-deliberate. *A fortiori* so, when the agreement or practice in question is particularly repugnant, such as

¹⁴⁴⁴ See Basedow, "Panel Three Discussion: Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 300.

¹⁴⁴⁵ The nature of this duty of arbitrators is debated. According to a balanced reading of *Eco Swiss*, arbitrators, not being bound by Art. 10 EC, are not under a Community law duty as such to apply EC competition rules. They rather *de facto* are inclined to do so, in order to avoid the danger of their award's annulment or non-enforceability on public policy grounds. See among others Komninos, 37 CMLRev. 459 (2000), p. 475 *et seq.*; Idot, *supra* (2003a), p. 314; Deisenhofer, "Panel Three Discussion: Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 296.

¹⁴⁴⁶ See also the more general view expressed by Paulis, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EU Competition Law* (Oxford, 2001), pp. 517-518; *idem*, "Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions", in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 459.

¹⁴⁴⁷ See Weigand, *supra* (1993), p. 257; Schlosser, "Arbitration and the European Public Policy", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997), p. 86; Idot, (1999) Rev.Arb. 639, p. 646; Liebscher, "European Public Policy after *Eco Swiss*", 10 Am.Rev.Int'l Arb. 81 (1999), p. 89 *et seq.*; Radicati di Brozolo, "Arbitro, diritto della concorrenza, diritto comunitario e regole di procedura nazionali", 9 Riv.Arbitrato 665 (1999), p. 687 *et seq.*

horizontal price-fixing, market-sharing or bid-rigging. On the other hand, a simple misapplication or incomplete application of EC competition law cannot qualify as a violation of *ordre public*, at least if the arbitrators have acted in an honest and diligent way.¹⁴⁴⁸

Therefore, if this is so, we wonder whether the likelihood of an *ordre public* violation can be a suitable criterion for the admissibility of preliminary references by arbitrators. There are three scenarios:

- (a) The first scenario is that the agreement in question raises no serious competition concerns that could lead to a public policy violation, although the arbitrators may still be in doubt as to certain questions. It is clear that in this case, following the line of argumentation above, they could not seize the Court with their questions, because of the remoteness of a public policy violation.
- (b) The second scenario is that the agreement contains competition distortions that are considered particularly objectionable by EC competition law, for example a price fixing or a market-sharing clause. In such cases, where an *ordre public* violation of the prospective arbitral award that would uphold such clauses is easy to prove, one wonders whether the possibility of the arbitrators to request a preliminary ruling from the Court of Justice would be of valuable assistance to them. Such extremely anti-competitive clauses can already be dealt with by the arbitrators themselves, and even if the latter for some reason are not able to do so, there would be no big benefit for the uniform application of EC competition law, if the Court of Justice intervened, since the issue would hardly be a novel one.
- (c) The third scenario is that the arbitrators are faced with a competition law issue, which is not *prima facie* very serious so that it could pertain to public policy, but under certain circumstances important public interests might come into play. If the arbitrators decide the whole issue paying due respect to EC competition law, there are two further possibilities in this grey area: One is that they get the competition issue correctly and no further problem arises. The second possibility is that they err in that application. It seems, however, that this error would not lead to a public policy violation, thus, the admissibility of a preliminary reference would not be admitted.

Therefore, bar some boundary cases, the *de facto* duty of arbitrators, as recognised by *Eco Swiss*, to apply EC competition law intertwined with their inability to seize directly the European Court of Justice might not be such a paradox.¹⁴⁴⁹

¹⁴⁴⁸ On the issue what constitutes a public policy violation by an arbitral award, see below.

Summing up, it now appears that a certain balance exists between arbitration and Community law. This balance can be identified in two interconnected levels, one being Article 10 EC and the other Article 234 EC:

- (a) Arbitral tribunals are not directly bound by Article 10 EC to apply Community law and *vice versa* they cannot base rights on that provision that national courts may enjoy.¹⁴⁵⁰ It is only indirectly that Article 10 EC comes into play, through the intervention of state courts assisting or reviewing arbitral proceedings and awards. Since the state courts are bound by that provision to review awards on Community law grounds, arbitrators are expected in an indirect way to pay due respect to that law, at least in cases raising very serious concerns as to the application of mandatory Community norms.¹⁴⁵¹
- (b) At the same time arbitrators cannot directly seize the Court of Justice by virtue of Article 234 EC, since they are not judicial organs of the Member States. Again, a question of EC law arising in arbitration can reach the Court only indirectly through the state courts, while the latter exercise their functions of assistance and supervision.

This balance of indirectness, whether satisfactory or not, is now well established and in view of the *Eco Swiss* judgment it is very difficult to vary or abandon altogether.¹⁴⁵² One could submit that this indirectness may well be to the favour of the institution of arbitration, since it leaves to the latter a wide range of discretion and freedom to deal appropriately with Community law. At the same time, the delay that the preliminary reference procedure entails is not certainly something good for arbitration and the whole purpose of arbitrating disputes in order to arrive at a speedy outcome would be defeated.¹⁴⁵³ The current flexibility entails of course also a higher degree of responsibility on the part of the arbitrators.

Having these points in mind, it seems to us that the possibility of an indirect preliminary reference through national courts remains at the current stage of development of the law by far the best solution.¹⁴⁵⁴

¹⁴⁴⁹ See in that respect the thorough analysis made by Radicati di Brozolo, *supra* (1999), pp. 692-693.

¹⁴⁵⁰ See *infra* on the question of co-operation between arbitrators and the European Commission.

¹⁴⁵¹ See also below on the *ex officio* application of EC competition law by arbitrators.

¹⁴⁵² See Van Gerven, *supra* (1995), p. 73, who refers to this interconnection between Arts. 10 and 234 EC in regard to arbitration. He rightly concludes that any change of attitude on behalf of the Court in considering arbitrators as 'courts or tribunals' in the sense of Art. 234 EC would by implication mean that they would also be considered as such under Art. 10 EC, thus being directly bound to ensure the effective judicial protection of individuals relying on their Community law rights.

¹⁴⁵³ See in this sense, T.C. Hartley, *European Union Law in a Global Context, Text, Cases and Materials* (Cambridge, 2004), pp. 195-196.

¹⁴⁵⁴ According to an eminent academic, the current state of affairs is satisfactory, since the EC competition rules are nowadays well known to international arbitrators, so that the latter can deal with them without the need

cc. Indirect Preliminary References through National Courts

i. Existing Possible Mechanisms

As seen above, the Court of Justice has denied direct access to arbitral tribunals, but it has recognised the possibility of a preliminary question on Community law being brought before it indirectly through the national courts. This could happen either while the arbitration is still pending in the form of a request by the arbitrator for assistance from the national courts, or in the course of a review of the arbitral award by the national courts, or at the stage when an *exequatur* of an arbitral award is sought in a national court. It is clear that of all these alternatives only the first one could be used in the context of an on-going arbitration. The other channels can only be used after an arbitral award has been rendered and one may no longer speak of assistance to an arbitral tribunal, but rather of assistance to a court reviewing the award.

However, as opposed to the setting aside and recognition/enforcement procedures, which are a common feature of national procedural laws, specific provisions on assistance by state courts to arbitrators during the arbitration proceedings, which could be used as a vehicle for an indirect preliminary reference, are rather exceptional. In *Nordsee*, the Court expressly referred to two possibilities of national court interference at this early stage: assistance in certain procedural matters and intervention in order to interpret the applicable law.¹⁴⁵⁵

The only national law that explicitly provides for a specific procedure of indirect preliminary references through the intervention of state courts is Danish law. The new Arbitration Act of 2005, conscious of the problems created by the arbitrators' inability to seize the Court of Justice and of the indirect methods advocated by the Court itself in *Nordsee*, provides in section 27(2) that "if the arbitral tribunal considers that a decision on a question of European Union law is necessary to enable it to make an award, the arbitral tribunal may request the courts to request the Court of Justice of the European Communities to give a ruling thereon". Such a request must be made to the state court that would have been competent to hear the

to request the ECJ's intervention. If under certain specific circumstances such a need arises, the possibility of an indirect reference through national courts is sufficient. See Fouchard, "L'arbitrage - Les règles de procédure face aux problèmes économiques", 11 RIDE 237 (1997), p. 252; in the same direction, Burrichter, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 481.

¹⁴⁵⁵ *Nordsee*, *op.cit.*, para. 14.

case if the parties had not agreed on arbitration and, interestingly, a court fee of DKK 400 is payable upon the filing of the request.

Of the national laws that do not expressly provide for such an indirect route to Luxembourg, section 45 of the 1996 English Arbitration Act is by far the most suitable national provision that can be used for an indirect preliminary reference. Under its wording, the High Court “may on the application of a party to arbitral proceedings determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties”. Such an application is made either with the consent of all the parties to the arbitration proceedings, or with the permission of the tribunal if not all parties agree. In the latter case the determination of the question must be likely to produce substantial savings in costs and the application must be made without delay.

A Community competition law question is certainly an important issue of law that may have significant effects not only on the on-going arbitration proceedings but also on a much more general scale. In addition, its decision by the Court of Justice through the intervention of the High Court at an early stage, as opposed to the review or enforcement stages, produces substantial savings in costs. It thus seems that the above provision would in principle be available for an indirect preliminary reference to Luxembourg.

It should be noted that the section 45 procedure has its limits in the autonomy of the parties to determine the law and procedure of the arbitral process. Thus, an application for the determination of a preliminary point of law to the High Court can only be made by a party and not by the arbitrators themselves. Therefore, at least one party must be willing to use this possibility, which means that the arbitral tribunal cannot make use itself of section 45 *ex officio*. At the same time, the parties can under section 45(1) exclude this reference to the state court. However, even in such cases the arbitrators may wish to draw the parties’ attention to the advantages of this procedure, when a serious EC competition law question arises that requires a preliminary reference to the European Court of Justice via the High Court. They could argue that it would be less costly, if the parties agreed at this stage to address that question through the section 45 procedure. In this case, the efficacy of the arbitral award would be secure, in contrast to an award that risks misapplying mandatory provisions of Community law.

It has been submitted that, since under section 82(1) of the Arbitration Act a section 45 application can only be made where the law governing the substance of the dispute is the law

of England, Wales or Northern Ireland, Community law does not fall under this definition.¹⁴⁵⁶

However, the Community legal system is an integrated system, where EC law is an integral part of each Member State's legal heritage¹⁴⁵⁷ and it therefore should not be considered as foreign to national laws in the private international law or in the comparative law sense. It is beyond doubt that this procedure can be used for EC competition law as well.

As was already mentioned, the prevailing pattern in Europe's arbitration and procedural laws is to exclude "dialogues" between state courts and arbitrators and to ensure the full independence of the arbitral process.¹⁴⁵⁸ The English solution is rather exceptional and it is recognised that it is in marked contrast to the UNCITRAL Model Law on International Commercial Arbitration, which does not permit judicial determination of preliminary points of law.¹⁴⁵⁹ Article 5 of the Model Law expressly prohibits any state court intervention, unless specifically and expressly provided so therein.

The new German law on arbitration, in force since 1998, has adopted the Model Law and espouses the independence of the arbitral proceedings from any court intervention. Indeed, section 1026 of the Code of Civil Procedure incorporates Article 5, thus prohibiting court interferences. However, section 1050 expressly provides that "the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence *or performance of other judicial acts which the arbitral tribunal is not empowered to carry out*".¹⁴⁶⁰ The latter reference to such judicial acts is a departure from the Model Law and echoes the old section 1036 of the Code of Civil Procedure, which, some minor differences apart, provided for the same possibility. An indirect preliminary reference to the Court of Justice through the intervention of the German courts seems to fit well into this procedure. The old section 1036 had been interpreted by commentators to encompass applications for preliminary rulings¹⁴⁶¹ and the same is accepted for the new provision too.¹⁴⁶²

¹⁴⁵⁶ See Liebscher, *supra* (1999), p. 86.

¹⁴⁵⁷ *Van Gend en Loos*, *op.cit.*, at 12. On the integration of Community into national law, see further K. Boskovits, *The European Union from the Viewpoint of International Law, Specificity and Extent of Autonomy of the Law of European Integration* (Athens/Komotini, 2000) [in Greek], pp. 27-29; Gaudin, "Diversité et évolution des champs d'application en droit communautaire", 13-14 RAE/LEA 7 (2003-2004), p. 13 *et seq.*

¹⁴⁵⁸ On Swedish law see Magnusson, "A Note on General Principles of Arbitration in Sweden", 2/2004 *Stockholm Arbitration Newsletter* 1, p. 2, stressing that the 1999 Swedish Arbitration Act is strongly focused on assisting the arbitral process, which is fully autonomous of any other court intervention.

¹⁴⁵⁹ This is so, because the Model Law does not permit review of awards for error of law. See Chukwumerije, "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996", 15 *Arb. Int'l* 171 (1999), pp. 180-181.

¹⁴⁶⁰ Emphasis added.

¹⁴⁶¹ See Kühn, "Die Bedeutung der Gerichte bei der Durchführung von Schiedsverfahren", in: Böckstiegel (Ed.), *Schiedsgerichtsbarkeit im Umfeld von Politik, Wirtschaft und Gerichtsbarkeit* (Köln/Berlin/Bonn/München, 1992), p. 66 *et seq.* and p. 68 in particular; Hermanns, "Public Policy and

The request to the courts is made either by one of the parties with the arbitrators' consent or by the arbitral tribunal itself. It would therefore seem from the wording that the latter could proceed so even *ex officio*. However, it is recognised that it is preferable in any case for the arbitral tribunal, in order to avoid doubts, to hear both parties and to invite them to make a corresponding statement authorising the request for a preliminary ruling.¹⁴⁶³ It is noteworthy that a similar provision exists in Austrian law. Under section 589 of the Austrian Code of Civil Procedure the arbitrators may request the courts to carry out those judicial acts that are necessary for the arbitral proceedings but the former have no jurisdiction to undertake.

In all these cases of indirect preliminary references through the intervention of state courts, the arbitral tribunal must exercise a high degree of prudence and must always use its best endeavours so as to attain the consent of the parties, bearing in mind the dramatic effects of such a detour on the privacy, confidentiality and ultimately on the duration of the arbitral process.¹⁴⁶⁴ Party authorisation, though not an absolute requirement, should always be requested by the arbitrators in all such cases of envisaged indirect preliminary references to the Court of Justice.

A final issue remains to be treated at this point. Although the Court of Justice does not usually determine whether the preliminary reference is made in accordance with the national procedural rules, nor does it examine the reasons that the national judge has when referring, it nevertheless requires that the preliminary reference is based on a real dispute and on a pending case before the national court. The preliminary reference procedure is not an autonomous non-contentious procedure, whose rulings are of an advisory nature. Instead, it was perceived as an incidental procedure, that renders rulings, which are preliminary to the final judgment to be rendered by the national court itself. The question then is the following: Does the indirect nature of the particular preliminary reference, where the main proceedings

Arbitration - Cartel Law", in: Böckstiegel (Ed.), *Acts of State and Arbitration* (Köln/Berlin/Bonn/München, 1997), p. 66.

¹⁴⁶² See J.-P. Lachmann and W. König, *Handbuch für die Schiedsgerichtspraxis* (Köln, 1998), pp. 188-189; R.A. Schütze, *Schiedsgericht und Schiedsverfahren* (München, 1999), pp. 103 and 153.

¹⁴⁶³ See Hermanns, *supra* (1997), pp. 66-67.

¹⁴⁶⁴ See Goffin, "L'arbitrage et le droit européen", 67 RDIDC 315 (1990), p. 334; Berger, *supra* (1993), p. 456; Erauw, "Reference by Arbitrators to the European Court of Justice for Preliminary Rulings", in: Briner, Derains et al. (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997), pp. 129 and 134; Simont, "Arbitrage et droit de la concurrence - Quelques réflexions d'un arbitre", (1998) RDAI/IBLJ 547, p. 554, who are in favour of the parties' consent in such cases and stress the fundamental fact of the delay that the preliminary reference procedure entails for arbitration.

are before the arbitrators, comply with the character of the Article 234 EC procedure as such?¹⁴⁶⁵

There is no doubt that even where the national court, in the context of on-going arbitral proceedings, merely transmits the Community law question to the Court of Justice, such preliminary references would be admissible, notwithstanding the fact that the referring judge is only faced with such a Community question in an indirect way. National courts in the exercise of their duties of supervision over arbitration proceedings and awards are not to be thought as mere intermediaries between arbitration and the Court of Justice.¹⁴⁶⁶ Even where a national court intervenes only to address a Community law question, it becomes a Community court of its own, a *juge communautaire de droit commun*, dealing with a real and pending case of an adversary nature, which deserves to be referred to the Court.¹⁴⁶⁷ In principle, the national court enjoys discretion whether to address an Article 234 EC reference to the latter, even if the parties to the arbitration or the arbitral tribunal itself have - in their application or transmission of the case - expressly specified the necessity of a preliminary reference.¹⁴⁶⁸ The Court of Justice will address its judgment to the referring court, since it was through the latter that it was seized with the issue and it will be up to the national court to make the preliminary ruling effective in the frame of its national law, by subsequently transmitting it to the arbitral tribunal.

In any case, this "mediation" of the national courts between arbitration and the Court of Justice is nothing but a result of the *Nordsee* ruling which in fact referred expressly to this possibility. Therefore, no issue about the role of the referring court should arise in such indirect preliminary references.

¹⁴⁶⁵ On this problem, see the analysis of Lenaerts and Pittie, *supra* (1997), pp. 210-211. See also Hepting, *supra* (1982), p. 330; Bebr, *supra* (1985), p. 500; De Gryse, "Quelques propos sur l'arbitrage en matière des brevets d'invention", in: *Jura vigilantibus, Antoine Braun, les droits intellectuels, le barreau* (Bruxelles, 1994), p. 113.

¹⁴⁶⁶ For this reason, the Danish solution whereby the arbitral tribunal's request to a state court to send a preliminary reference to Luxembourg must be accompanied by the payment of a court fee, may not be appropriate or elegant, because it gives the impression of a national court being merely a sort of registry that only transmits the reference to the ECJ.

¹⁴⁶⁷ See Lenaerts and Pittie, *supra* (1997), p. 211.

¹⁴⁶⁸ That the intervening national court does not lose its discretion to refer the EC law issue to the ECJ can be deduced from the language of the *Nordsee* ruling, according to which "it is for those national courts and tribunals to ascertain *whether it is necessary for them* to make a reference to the court under Article [234] of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of Community law which they may need to apply when exercising such auxiliary or supervisory functions" (*Nordsee*, *op.cit.*, para. 15, emphasis added). Of course, in practice, it will be extremely unlikely for the national court to deal with the Community law question itself without seizing the ECJ, as requested by the arbitrators or by the parties. This could happen only if the questions concerned are of a spurious or impertinent nature for the resolution of the dispute, or if the issue that has arisen evidently is *acte clair*.

ii. Finding Other Creative Solutions

Unlike the situation in English, German and Austrian law, where existing specific provisions could be used for an indirect preliminary reference, it will be much harder to do so, when national laws do not provide for such channels and prohibit any state court intervention in arbitral proceedings, as prescribed in Article 5 of the Model Law. However, it is recognised that complete party autonomy and freedom from any judicial interference should not be seen as an absolute principle and might not always be in the best interests of the parties or might not even further the efficiency of arbitration in a particular case.¹⁴⁶⁹ Thus, a parallel can be derived from section 1(c) of the English Arbitration Act, which is equivalent to Article 5 of the Model Law in precluding any court intervention¹⁴⁷⁰ and is interpreted as reducing the powers of interference of courts but not as extending to cases of courts' assistance to arbitrators.¹⁴⁷¹

These arguments apart, it remains a fact that in most EU Member States legal systems no parallel provisions exist that could serve as an indirect channel to seize the Court under Article 234 EC during the arbitral proceedings.¹⁴⁷² One finds only provisions that usually deal with state court interference in the formation of the arbitral tribunal, in the taking of evidence and in provisional measures.¹⁴⁷³ Whether such provisions can be relied upon to that end is very unlikely, with the possible exception of provisional measures. Of course, it is up to those national laws and courts to give a solution to this problem. Among the solutions that have been proposed is to provide expressly by means of legislation for such a possibility,¹⁴⁷⁴ as

¹⁴⁶⁹ See Theofrastous, "International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-localization Debate", 31 Case WRes.Jnt'IL 455 (1999), p. 460; Chukwumerije, *supra* (1999), p. 171. See also Berger, *supra* (1993), p. 198, who thinks that the Model Law may have gone too far in adopting an excessive degree of party autonomy.

¹⁴⁷⁰ See Samuel, "Arbitration Statutes in England and the USA", 8 ADRLJ 2 (1999), p. 24.

¹⁴⁷¹ The Departmental Advisory Committee in its Report on the Arbitration Bill in February 1996 expressed its favour for the modern approach of the courts to intervene only in order to support rather than displace the arbitral process. See generally Chukwumerije, *supra* (1999), pp. 175-177.

¹⁴⁷² See e.g. Moitinho de Almeida, "La notion de juridiction d'un État membre (Article 177 du Traité CE)", in: Rodríguez Iglesias, Due *et al.* (Eds.), *Mélanges en hommage à Fernand Schockweiler* (Baden-Baden, 1999), p. 470, with a specific reference to Spanish law.

¹⁴⁷³ The latter channel has been suggested in Belgium, where the development of the case law on provisional measures might seem to accommodate this possibility. See Goffin, *supra* (1990), p. 334, according to whom the arbitrators could suggest to the parties to request from the *juridiction de référé* to submit to the ECJ questions of EC law. The same possibility seems to exist in Italian law, which does not empower the arbitral tribunals to take preliminary measures. Those fall under the exclusive competence of the civil courts. If the dispute that necessitates the taking of such measures pertains to EC competition law, the courts of first instance will be competent to proceed to preliminary measures and then possibly to seize the ECJ with a preliminary reference.

¹⁴⁷⁴ In the Netherlands, it has been proposed to add a new Art. 1044a in the Code of Civil Procedure, which would require Dutch arbitral tribunals to have an EC law question submitted to the ECJ through the President of

indeed was recently done in Denmark, or to explore broadening the functions of the *juge d'appui* or supporting judge so as to include also the transmission of preliminary references by arbitrators to the Court of Justice.¹⁴⁷⁵

Of course, the absence of a national provision, that could lead to arbitrators seizing the Court of Justice in an indirect way does not offend against EC law or its effectiveness. The only bearing that EC law can have here, is in the interpretation of national law by national courts, which has to be in conformity to Community law. Thus, a national court interpreting a provision of national procedural law, for example a provision that refers to court assistance in certain matters, shall have to proceed to that interpretation in conformity with Community law and thus also with Article 234 EC and with its interpretation in *Nordsee*.

This is also a duty based upon Article 10 EC and on the principle of effective judicial protection. The Court of Justice has in fact interpreted Article 10 EC and the principle of sincere co-operation as meaning that national courts are required, so far as possible, to interpret and apply national rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application of a Community act of general application, by pleading the invalidity of such an act.¹⁴⁷⁶ This duty of national courts is intended to compensate for the restrictive conditions concerning the admissibility of direct actions against Community acts of general application under Article 230 EC. The same holds true where a natural or legal person invokes a failure to take a decision, within the meaning of Article 232 EC, which it considers it to be contrary to Community law. Again the Court has held that Article 10 EC and the principle of effective judicial protection impose a duty upon national courts to interpret their national procedural law in such a manner as to compensate for the impossibility directly to seize the Community judiciary.¹⁴⁷⁷ This principle is clearly transposable to the question of indirect preliminary references by arbitrators. Since a direct preliminary reference by arbitrators is inadmissible, national courts are under a duty to

the District Court of Amsterdam (see Berger, *supra* (1993), p. 457). As recently as 2002, a group headed by Professor Albert Jan Van den Berg had again proposed an amendment of the Dutch Arbitration Act, that would permit an arbitral tribunal sitting in Holland to request a local court to make a reference to the ECJ on behalf of the tribunal. The rationale behind this proposal is to make the Netherlands a more attractive arbitration seat for cases involving EC competition law.

¹⁴⁷⁵ See in the context of French law, Idot, *supra* (2003a), p. 318. In Italian law it is debated whether Art. 819(1) of the Code of Civil Procedure, which refers to the decision of incidental questions by state courts, may apply by analogy. Arbitrators could stay the proceedings and invite the parties to submit the specific incidental question to national courts, which on their turn can refer it to the ECJ (see D'Alessandro, "Pregiudizialità comunitaria ed arbitrato interno", 7 Riv.Arbitrato 445 (1997), pp. 449-451).

¹⁴⁷⁶ Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, [2002] ECR I-6677, paras. 41-42.

¹⁴⁷⁷ Case C-511/03, *Staat der Nederlanden (Ministerie van Landbouw, Natuurbeheer en Visserij) v. Ten Kate Holding Musselkanaal BV et al.*, [2005] ECR I-8979, para. 29.

interpret their national procedural law in such a manner as to provide at least for the possibility for an arbitral tribunal indirectly to seize the Court of Justice.

Conform interpretation can be an efficient and welcome mechanism in extending court assistance for arbitration proceedings to Article 234 EC. But it has its limits and it cannot go as far as intruding into the procedural autonomy of the Member States. Notwithstanding that, such an intrusion would be entirely disproportionate, since the effectiveness of Community (competition) law is protected at the later stage of setting aside and enforcement proceedings of arbitral awards.¹⁴⁷⁸ True, the absence of any mechanism of indirect preliminary reference procedure at an earlier point is disappointing, but not intolerable, in view of the other possibilities just mentioned.

By the same token, the existence of an indirect possibility to seize the Court of Justice with a preliminary ruling at the stage of the arbitral proceedings does not mean that national courts are not under a duty to exercise an adequate degree of control over arbitral awards at the later stage of recognition and enforcement or in setting aside procedures. Such a view¹⁴⁷⁹ relies on the fact that the Court in *Eco Swiss* specifically justified the necessity of intensified state court over arbitral awards by having recourse to the arbitrators' inability to forward preliminary references on questions of EC law to it.¹⁴⁸⁰ However, this argument is in conflict with the Court's powerful assertion that EC competition law forms part of *ordre public communautaire*, which itself is integrated in the notions of public policy of each national legal system.¹⁴⁸¹ If an arbitral tribunal endorses in its final award a overtly anti-competitive agreement of hard core nature, the fact that there was a possibility under the applicable national procedural law for an indirect preliminary reference through national courts seems immaterial.

b. Arbitration and European Commission

aa. Arbitration and Regulation 1/2003

¹⁴⁷⁸ See below the analysis of the *Eco Swiss* ruling.

¹⁴⁷⁹ See Liebscher, *supra* (1999), pp. 85 and 93.

¹⁴⁸⁰ *Eco Swiss*, *op.cit.*, para. 40.

¹⁴⁸¹ *Eco Swiss*, *op.cit.*, paras. 36-39. Compare Poillot-Peruzzetto, "L'ordre public international en droit communautaire : À propos de l'arrêt de la Cour de justice des Communautés du 1er juin 1999 (*affaire Eco Swiss China Time Ltd.*)", 127 JDI (*Chunet*) 299 (2000). See also Radicati di Brozolo, *supra* (1999), p. 684, who rightly submits that the Art. 234 EC argument used by the Court in *Eco Swiss* does not reduce its *ordre public communautaire* argumentation and, he goes on to say, these arguments could be thought of merely as *obiter dicta*.

Since, for the reasons explained above, arbitrators are barred from any direct dialogue and co-operation with the Court of Justice, the burden falls on the European Commission to fill this gap by providing an informal route of co-operation with arbitration. It seems however that the Commission is not inclined to provide in a clear, unambiguous and generalised manner this kind of assistance to arbitrators that it has resolved to provide to national courts.

Naturally, one would have not expected or - indeed - favoured an explicit reference to arbitration in the text of Regulation 1/2003. It would not have been appropriate for the Regulation, being a hard law instrument of Community law, to include references to arbitration, which - from a strictly legal point of view - is an institution not directly subject to Article 10 EC, in the way that national courts, the judicial organs of the Member States, are. Indeed, the system of the relationship between the Commission and national courts that is established by Regulation 1/2003 may be less hierarchical than the one between the former and national competition authorities, yet it is made up of specific and direct Community law-based powers and duties which echo and are in a sense *leges speciales* of Article 10 EC which remains the *lex generalis*. These duties and powers of the national courts are related to their nature as Community judges (*juges communautaires de droit commun*) and to their co-operation with Community institutions, in this case the Commission.¹⁴⁸²

Arbitration, on the other hand, is not *ex lege* subject to Article 10 EC.¹⁴⁸³ This means that most of the co-operation and co-ordination mechanisms between national courts and the Commission provided for in Regulation 1/2003 are not transposable to arbitration.¹⁴⁸⁴

Thus, neither Article 10 EC nor Article 15(1) of Regulation 1/2003 can provide for a legal basis for a formal co-operation between the Commission and arbitrators in the sense of the former being bound to offer assistance on a specific competition-related issue to the latter. Arbitral tribunals are not judicial organs of the Member States, to which Article 10 EC is addressed.¹⁴⁸⁵ This means that on the one hand they are immune of any duty of co-operation stemming from this provision, but on the other hand Community institutions are not bound to co-operate with them, as is the case with national courts.

¹⁴⁸² See Temple Lang, *supra* (1990), p. 646, who considers that the Community status of national courts flows directly from Art. 10 EC.

¹⁴⁸³ That arbitration is not formally speaking subject to Art. 10 EC is a generally accepted proposition. See e.g. Van Gerven, *supra* (1995), p. 73; Komninos, *supra* (2001), p. 228; Idot, *supra* (2003a), p. 318; Shelkopyas, *supra* (2003), p. 423.

¹⁴⁸⁴ See in this sense Idot, *supra* (2003c), p. 11.

¹⁴⁸⁵ According to the Commission's Explanatory Memorandum of the September 2000 regulation proposal, Art. 15 codified "the existing obligation of the Commission, based on Article 10 of the Treaty, to cooperate with national courts".

Then, under Article 15(2) of the new Regulation, Member States are under a duty to forward to the Commission copies of “written judgments” of “national courts”. The letter of this provision certainly does not apply directly to arbitral awards and tribunals.¹⁴⁸⁶ It might have been tempting to argue that the imposition of this administrative duty to Member States, rather than to courts, as was initially proposed by the Commission text of the 2000 regulation proposal, might mean that the former have to forward to the Commission also copies of arbitral awards applying Articles 81 and 82 EC. Such an argument, however, fails in view of the letter of the text, but also in view of its ratio, which is to make the Commission aware of possible cases of national litigation, where the former can intervene at a later stage as *amicus curiae*. It would also be incompatible with the system of the relationship between the Member States (national courts) and the Commission prescribed by Article 15, which is not applicable to arbitration. Besides, states do not have in place – indeed they should not have – mechanisms to be notified arbitral awards, so it is impossible for a Member State to know at a given time the number of arbitrations and arbitral awards. In an open and democratic society, this would be unthinkable.

Naturally, indirectly arbitration may be affected by Article 15(2), in case state courts have exercised a review of an arbitral award, or have given judgment concerning the recognition or enforcement of an arbitral award, or have even intervened in support of the arbitration proceedings, for example ordering themselves a provisional measure.¹⁴⁸⁷ All these court judgments will have to be forwarded to the Commission by the Member State in question, if Community competition law has been applied by the court. It should be stressed that it is neither sufficient nor necessary for such a Community law duty to exist, if *the arbitrators* have applied Articles 81 and 82 EC. The national court *itself* must have applied these provisions.¹⁴⁸⁸

As for the power of the Commission (or of national competition authorities) to submit written or oral observations *ex officio* to national courts pursuant to Article 15(3) of the new

¹⁴⁸⁶ The duty to inform the Commission of judgments that have applied the EC competition rules, imposed by Art. 15(2) Reg. 1/2003 upon Member States, should not be confused with the occasional duty that has been imposed by the Commission in the past upon undertakings to inform the former of the outcome of arbitral awards (see *supra*). This duty has been included, by way of condition or obligation, in some individual exemption decisions and in certain block exemption regulations. The new system of enforcement leaves no more room for such duty of information, unless it has been included in a commitment given by undertakings to the Commission pursuant to Art. 9 Reg. 1/2003 or in the context of merger control.

¹⁴⁸⁷ This is so, if the wider meaning of “judgment” is followed, which also covers courts’ decisions that are final in nature, yet they may be interim or partial. See above.

¹⁴⁸⁸ Article 15(2) Reg. 1/2003 would cover also court decisions that have applied the Treaty competition provisions, even if the arbitral tribunal might not have touched upon this issue.

Regulation, again such a mechanism is neither applicable nor transposable to arbitration.¹⁴⁸⁹ Any attempt to extend such measures to arbitration proceedings should be avoided not only as being unnecessary and disproportionately restrictive, but also because it would be detrimental to the nature of arbitration and to the most fundamental principles of the arbitration process. The danger in that case lies in the intrusion of the Commission to the very substance of arbitration, which is an expression of the will of the parties providing for a non-judicial forum for settling disputes. This intrusion would be contrary to the basic principle of privity, confidentiality¹⁴⁹⁰ and independence of arbitration. If competition authorities were to demand to become privy to arbitration involving competition issues, many parties might opt to transfer their arbitrations to venues outside of the EU, especially if one of the parties is not an EU national.¹⁴⁹¹

The question remains whether the intervention of a competition authority would be possible, if the arbitration agreement itself provided for such a possibility or if the arbitrators were to give permission to this and both parties gave their consent.¹⁴⁹² In such a case, the flexibility of arbitration would advocate in favour of a positive answer. However, there are good policy reasons that plead against placing too much emphasis on the consent of the parties. In practice, it will be quite difficult for a party to the arbitration proceedings to resist the Commission's or another competition authority's intervention without raising its suspicions and thus without attracting its "attention".¹⁴⁹³ Therefore, it can be taken for granted that a party would in most cases *volens nolens* acquiesce in such an intervention. In other words, to condition such a mechanism on the parties' consent would not really be meaningful. Only in those cases where the two parties genuinely agree to ask the Commission to intervene in order to shed light to some important competition law question, should the arbitrators seek or allow such intervention.

If the above conditions are met,¹⁴⁹⁴ in most cases it will be preferable to allow the European Commission to interfere only through the submission of arguments in writing, without

¹⁴⁸⁹ See Idot, *supra* (2003c), p. 11.

¹⁴⁹⁰ On the principle of confidentiality and its limits from a comparative law perspective, see Misra and Jordans, "Confidentiality in International Arbitration: An Introspection of the Public Interest Exception", 23 *Jint'IArb.* 39 (2006). The principle of confidentiality may recede and, thus, allow for *amicus curiae* briefs by third parties only in cases of public-private, i.e. investment, arbitration. See further Mistelis, "Confidentiality and Third Party Participation: *UPS v. Canada and Methanex Corporation v. United States*", 21 *Arb.Int* 211 (2005), p. 221 *et seq.*

¹⁴⁹¹ See Lew, "EEC Law Restriction on Arbitration", 47 *Arb.* 117 (1981-82), p. 119.

¹⁴⁹² In such a case there would be no violation of the fundamental principle of confidentiality. See Müller, "La confidentialité en arbitrage commercial international : Un trompe-l'œil ?", 23 *Bull. ASA* 216 (2005), p. 223.

¹⁴⁹³ "Attention" here means the opening of a public enforcement proceeding.

¹⁴⁹⁴ In other words, if the arbitration agreement allows that or if the arbitrators and the parties consent thereto.

however giving it the power to participate in the arbitration hearings or to have access to the file of the case and to documents produced during the proceedings. This solution has been followed in the context of NAFTA arbitration, which is certainly very different from a purely private commercial arbitration, but could be considered by analogy, always under the above conditions.¹⁴⁹⁵ While it is true that the Commission could, if it so wished, use its own administrative powers of enforcement to request information about the arbitration proceedings or access to certain documents, there is no reason to formalise and import this practice in the law of arbitration. Thus, arbitrators should not allow an interference by the Commission, irrespective of how the parties choose to react to a possible request for information by the Commission under Regulation 1/2003.

Surprisingly, however, the above proposition as to the inapplicability of the *amicus curiae* mechanism to arbitration, is not shared by all commentators. Indeed, it seems that some enthusiasm about the possibility of the Commission's intervention in arbitration proceedings is expressed more by the arbitration milieu than by the antitrust enforcers themselves.¹⁴⁹⁶ If, as we will see below, the Commission has excluded the application of its co-operation Notice to arbitration, it is rather difficult to explain this one-sided enthusiasm.

Commentators in favour of that possibility usually refer also to the latest trend of the Commission to accept (in reality to demand) arbitration commitments by parties. Since arbitration is used by the Commission as an important monitoring and dispute resolution mechanism, then, the argument goes,¹⁴⁹⁷ the Commission has any right and power to intervene in that "regulatory arbitration".

There are at this point two important distinctions to be made:

- (a) The first distinction is between the formalised procedures provided for by Article 15 of Regulation 1/2003 and the co-operation Notice, and the specific provisions on the Commission's possibility to intervene as *amicus curiae* that may be contained in arbitration commitments. In our view, the two must not be confused. Indeed, any possible *amicus curiae* intervention by the Commission in the first context would be an *ex lege* one and is therefore inapplicable to arbitration because Article 10 EC and

¹⁴⁹⁵ On this practice in the NAFTA arbitration context see Betto, Fry, Henry, Kleiman and Pinsolle, "Nouvelles tendances de l'arbitrage international", (2006) RDAI/IBLJ 371, p. 378. The authors distinguish between transparency and interference. Interference by third governmental or non-governmental parties should not be allowed.

¹⁴⁹⁶ See e.g. Abdelgawad, "L'arbitrage international et le nouveau règlement d'application des articles 81 et 82 CE", (2004) Rev.Arb. 253, p. 268 *et seq.*; Nisser and Blanke, "Reflections on the Role of the European Commission as *amicus curiae* in International Arbitration Proceedings", 27 ECLR 174 (2006), p. 176 *et seq.*

¹⁴⁹⁷ See in particular Nisser and Blanke, *supra* (2006), p. 179 *et seq.*

Article 15 of Regulation 1/2003 do not apply directly to arbitration.¹⁴⁹⁸ On the other hand, a possible intervention by the Commission in an arbitration proceeding pursuant to commitments would not be based on the law, as above, but rather on the arbitration agreement itself. There is, in other words, an important difference in the legal basis between the two situations.

In addition, the two situations must not be confused for another, perhaps more important, reason: Regulation 1/2003 and the co-operation Notice mechanisms are applicable only to those cases where a national court applies EC competition law. Their rationale is to enable the Commission to intervene in cases where the Community public interest requires in order to inform the court of the Commission's position about some fundamental issue of EC competition law. Yet, in the case of arbitration pursuant to arbitration commitments, the arbitrators in reality *do not usually apply substantive EC competition law*. They do not deal with such questions as the applicability of Article 81(1) EC, the four criteria of Article 81(3) EC or efficiencies under Article 82 EC. These are questions that will have already been dealt with in a definitive manner by the Commission itself before it accepted the commitments.¹⁴⁹⁹ The role of the arbitrators pursuant to the arbitration commitment is not to re-litigate competition law issues, but rather to deal with technical or peripheral legal questions, such as the level of fees and royalties, the conditions of access to a network, the commercial conditions of a divestiture, etc. These can at best be described as commercial law disputes, indeed the idea is that these should not be decided by the Commission, which should rather concentrate on the competition law questions. It is unclear to us why these disputes raise a fundamental concern pertaining to the Community public interest, in order to apply – even by analogy – the *amicus curiae*-related provisions referred to above.

- (b) The second distinction has to do with arbitration pursuant to commitments. It is a distinction between law and policy. In strictly legal terms, if an arbitration commitment contains specific provisions about the Commission's possibility to intervene in the arbitration proceedings, the subsequent arbitration agreement will in effect integrate those provisions too. So the possibility of the Commission's intervention will be an integral part of the arbitration agreement. What however is

¹⁴⁹⁸ Besides, the co-operation Notice itself does not apply to arbitration.

¹⁴⁹⁹ Of course, the Commission in the context of merger control does not apply Arts. 81 and 82 EC (*ex post* enforcement) but only Reg. 139/2004 (*ex ante* enforcement). Then, the Commission uses a different analysis in merger control and proceeds on the basis of "competition concerns" and not of competition law violations.

possible in law, should be avoided for policy reasons. As expounded above, an arbitration procedure that does not give the impression of independence and privity but appears as guided by and dependent on the Commission, may not be perceived as an independent dispute resolution method leading to enforceable arbitral awards akin to judicial decisions. That would be detrimental to arbitration as an institution and to the effectiveness of the arbitration commitment (as a competition law enforcement tool) itself.

bb. The Commission's Ignorance of Arbitration in the Co-operation Notice

Whereas the ignorance of arbitration by the Commission might have been excusable in the initial stages of the modernisation process, it now seems less justified. Decentralisation is already a fact and it has now been realised - even by the staunchest critics of the White Paper - that national courts are called to play a more active role. To continue ignoring arbitration, the "natural judge" of most business disputes, especially in the international context, is certainly regrettable.¹⁵⁰⁰

Whereas one would have welcomed at least a reference to arbitration in the accompanying soft law measures of modernisation, in particular in the Notice on co-operation between the Commission and national courts, regrettably the Notice excludes any possibility of co-operation between the Commission and arbitration tribunals, by adopting, in our view entirely unreasonably and unnecessarily, a definition of "court" that follows the "court or tribunal" criterion of Article 234 EC, as interpreted by the Court of Justice.¹⁵⁰¹ Thus, paragraph 1 states that "for the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask for a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC". It is not clear whether this language intended to refer implicitly to arbitration, though there is some evidence that this may well have been the intention.¹⁵⁰²

¹⁵⁰⁰ See Idot, *supra* (2004c), p. 81.

¹⁵⁰¹ Para. 1 of the co-operation Notice.

¹⁵⁰² Thus, see Paulis, "Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions", in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 459, who explains that, indeed, the Commission was probably "frightened" to grant full access to arbitrators for the same reasons as maybe the ECJ was. The exclusion of arbitration from the mechanisms of the co-operation Notice has been criticised by many stakeholders in their comments on the Commission's modernisation package. See e.g. the comments by

An additional criticism that can be advanced against this unfortunate text is that it is Article 10 and not 234 EC that should guide the Commission in its co-operation with national courts. Indeed, Article 15 of Regulation 1/2003 and, in a certain sense, also the co-operation Notice, are *leges speciales* of the *lex generalis* of Article 10 EC. This means that an entity considered as a “court” in the national legal order should be able to co-operate with the Commission on the basis of Article 10 EC and of the *Delimitis* and *Automec* principles of co-operation. In other words, the term “court or tribunal” in Article 234 EC may be narrower than what may nationally be considered a “court”. In our view, it would be inappropriate for the Commission to shut its doors to such a “court”, since the latter, being an organ of the Member State in question, should be able to seize the Commission according to Article 10 EC, notwithstanding paragraph 1 of the new co-operation Notice.

In any event, however, it is reasonable to believe that the Commission intended to exclude arbitration only from the specific procedural framework of the new co-operation Notice, which contains also self-imposed deadlines for the Commission’s assistance, while entertaining requests from arbitrators on an *ad hoc* and fully discretionary basis, rather than being bound to engage in a dialogue with arbitrators as it is bound to do so with courts.¹⁵⁰³

The soft law nature of the co-operation Notice means that its mechanism could be used by analogy also by arbitrators.¹⁵⁰⁴ Thus, on an informal basis, arbitrators should be able to seek the Commission’s assistance, whenever a legal or factual problem arises in regard to a question of enforcement of EC competition law. Any disrespectful attitude of the Commission towards arbitration in this regard would run counter to the long-established recognition of arbitration in all Member States as an alternative judicial forum. At the same time, it would not serve the Commission’s purpose to further the decentralised civil enforcement of EC competition law, and it might alienate arbitrators, with the possible repercussion that the latter would rather suppress a difficult competition law issue, instead of running the risk to decide it wrongly themselves and consequently to expose their award to annulment. Finally, a negative approach towards such requests of assistance by arbitrators

professor Laurence Idot, the Joint Working Party of the Bars and Law Societies of the UK on Competition Law, and the law firm Clifford Chance.

¹⁵⁰³ See Paulis, “Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions”, in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), pp. 459-460.

¹⁵⁰⁴ See in respect of the old co-operation Notice, Slot, *supra* (1996), p. 112; Radicati di Brozolo, *supra* (1999), p. 676.

would not be in conformity with the Commission's central role in the enforcement of the competition law regime of the Treaty.¹⁵⁰⁵

Indeed, there have been many indications that the Commission has been quite open in providing assistance to arbitrators applying EC competition law. It has been noted that the Commission has on occasions treated arbitral tribunals in the same way as national courts under the old Notice on co-operation.¹⁵⁰⁶ In one reported case the Commission received and responded to an application for legal information by the *Tribunal Arbitral de Barcelona*, an *ad hoc* arbitration tribunal.¹⁵⁰⁷ The information sought referred to an alleged dominant position of a public undertaking that controlled the bidding and executing of certain infrastructure projects in a Spanish region. It is interesting that the arbitration tribunal wanted to know whether the undertaking in question occupied a dominant position "in the sense of the Court of Justice's case law". We can only suppose that this is a question that normally would have been addressed to the Court of Justice itself, had the referring body been a court. The case, thus, demonstrates how the Commission can remedy in some instances the inability of arbitrators to seize the Court of Justice with a preliminary reference.

As arbitrators will be applying Article 81(3) EC, which admittedly entails more elaborate competition-related economic and legal questions, and as arbitration will increasingly be seen more favourably by the Commission, the latter is expected to co-operate more often with arbitral tribunals in appropriate cases. As for the kind of assistance that arbitrators could request, this would not be substantially different from that, which the courts may request.¹⁵⁰⁸ It covers factual information, for example questions on the identity of the undertakings concerned, or information whether a certain case is pending before the Commission, or whether the latter has reached a decision or a reasoned opinion in this matter. It may also refer to a legal issue of EC competition law, as well as to economic data, such as statistics, market characteristics, and economic analyses.

Whether the request of such information or assistance by the Commission is desirable, is, of course, only for the arbitrators to decide. However, it is a question of the law governing the arbitral process and of the arbitration clause itself, whether an arbitrator may use such a facility *sua sponte*. This is a sensitive issue, because the privity of the arbitral process

¹⁵⁰⁵ According to Art. 85 EC "the Commission shall ensure the application of the principles laid down in Articles 81 and 82"

¹⁵⁰⁶ See Temple Lang, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 418; De Gryse, *supra* (1994), p. 114; Simont, *supra* (1998), p. 550.

¹⁵⁰⁷ See Joris, *supra* (1998), p. 48.

¹⁵⁰⁸ See e.g. para. 21 *et seq.* of the co-operation Notice.

recedes, and arbitrators will have to show extreme diligence. Indeed, according to one view arbitral tribunals should abstain from seizing the Commission, since the parties have submitted their dispute only to them and the applicability of Article 81 EC is still a question of law, which only they should deal with.¹⁵⁰⁹ Most likely, they could take such an initiative, if one of the parties has filed a complaint with the Commission, thus having brought the matter already to its attention, if both parties consent, or if the terms of reference of the arbitration allow that.¹⁵¹⁰ In any case, specific consultations with and hearing of all parties seem to be necessary.¹⁵¹¹ Indirectly an arbitrator could enjoin the parties to supply him with certain legal or economic information or data, while stressing to them that this information could be easily requested from the Commission, if they consented to that.¹⁵¹²

It might have been desirable for the Commission to publish a notice on co-operation with arbitral tribunals. Such a notice could provide for a more structured dialogue between the Commission and arbitrators, while increasing the transparency of the whole system of co-operation. It would also raise the EC competition law awareness of arbitrators and of the parties to an arbitration, without encroaching on the flexibility and privity of the arbitral process. In any case the Commission would not be legally bound to provide such assistance to arbitral tribunals, although it is evident that it is to its interest to do so.¹⁵¹³ This comes as a direct consequence of the non-applicability of Article 10 EC to arbitrators. Since the latter are not under any duty, as a question of EC law, as against the Community institutions, similarly the Commission should not be so bound.

In addition to such ways for arbitrators to seize the Commission, informal and indirect channels may equally be as effective. Indeed, the parties to an arbitration proceeding might even seize the Commission and request a guidance letter under the Notice on guidance letters.¹⁵¹⁴ For such an attempt to be successful the three positive and two negative

¹⁵⁰⁹ See Goffin, *supra* (1990), p. 333.

¹⁵¹⁰ See Simont, *supra* (1998), p. 550 *et seq.*, according to whom the arbitrators, who are contractually bound with the parties, could be personally liable, if they exposed them to proceedings (before the Commission) that can lead to fines.

¹⁵¹¹ See Blessing, "Introduction to Arbitration - Swiss and International Perspectives", in: Berti, Honsell *et al.* (Eds.), *International Arbitration in Switzerland, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Basel/London/Boston, 2000), p. 235.

¹⁵¹² See Simont, *supra* (1998), p. 550. For such an indirect possibility for the Commission to assist national proceedings see para. 42 of the previous Notice on co-operation, which stated that the Commission may be seized indirectly to assist the course of a national proceeding, when parties have been ordered by the court concerned to provide certain information. However, it should be noted that under the new co-operation Notice, parties no longer enjoy such an autonomous right to seize directly the Commission, and it is only open to national courts to ask for the Commission's assistance.

¹⁵¹³ See Lenaerts and Pittie, *supra* (1997), p. 218.

¹⁵¹⁴ See above.

cumulative conditions, set out in the Notice, must be satisfied.¹⁵¹⁵ (a) the question involved must be novel; (b) its clarification must be useful from an economic point of view; (c) the parties must provide the Commission with complete information; (d) there must be no identical or similar case pending before the European Courts; (e) there must be no Commission, national competition authority or national court pending proceeding involving the applicant. The latter condition will be fulfilled even if the applicant is a party to arbitration proceedings, first because arbitration is not mentioned in the Notice and second because the rationale of this text is the existence of a more direct and structured co-operation mechanism between the Commission and national courts that Regulation 1/2003 and the new co-operation Notice expressly provide for. Since arbitration is not mentioned in Regulation 1/2003 and is indeed excluded by the co-operation Notice, then there is no reason to deny parties to an on-going arbitration the possibility to request a guidance letter from the Commission.

In any event, such a channel would be clearly open only to undertakings and not to arbitrators deciding a case. Even if the latter could use such a mechanism, which is not the case, they should actually avoid this informal venue because of the lack of any transparency. If, on the other hand, a party to the arbitration proceedings contacted the Commission (or a national competition authority) on a specific issue, and if the latter finally issued a reasoned opinion or guidance letter in response to such communication, undoubtedly that opinion or letter, though formally not binding on the arbitration proceedings, would carry a certain degree of persuasiveness that the arbitral tribunal would welcome and certainly not ignore.

cc. The Special Case of Non-EU-based Arbitral Tribunals

Community competition law may arise in and may be applied by arbitral tribunals sitting not only in the territory of the European Union, but also in other extra-EU jurisdictions. The question arises as to the possibility of these tribunals to receive assistance from Brussels or Luxembourg in the application of EC competition law.

A certain issue, which might be difficult to determine is the “nationality” of an arbitral tribunal. As has been rightly observed, that is a technical difficulty, with which Article 234 EC cannot cope with,¹⁵¹⁶ and sometimes has been used as an argument against the admissibility of preliminary references by arbitrators altogether. The Court of Justice in

¹⁵¹⁵ Para. 9 of the Notice. For a detailed analysis of these conditions see above.

¹⁵¹⁶ See Erauw, *supra* (1997), p. 127; Lenaerts and Pittie, *supra* (1997), p. 211.

numerous occasions of preliminary rulings has stressed the particular importance and objective of Article 234 EC, always using a geographical reference, namely that it is *within the Community* that divergences in judicial decisions on questions of Community law are to be prevented.¹⁵¹⁷ There is hardly any doubt that a foreign arbitral tribunal, even if *Nordsee* were reversed, cannot proceed to a preliminary reference to Luxembourg. The same goes for foreign (non-EU) courts that may be acting in support or supervision of those non-EU arbitral proceedings and awards. On the other hand, EU courts reviewing foreign (non-EU) arbitral awards can always seize the Court of Justice. Another possibility for a question of EC (competition) law, arising out of such arbitral proceedings, to reach the Court is when the parties to these extra-EU arbitral proceedings request the assistance of an EU national court outside the seat of the arbitration.¹⁵¹⁸ That national court could conceivably proceed to a preliminary reference.¹⁵¹⁹

Be it as it is with regard to the Court of Justice, there is no reason why the Commission should not offer its assistance to such arbitral tribunals. In the first place, in today's globalised commercial world it would be futile to distinguish between EU and non-EU arbitral tribunals, since it is quite often difficult to identify the "nationality" of an arbitral tribunal. Secondly, if the main duty and concern of the European Commission is to ensure that the principles of Articles 81 and 82 EC are effectively applied and that the conditions of free and undistorted competition are safeguarded in the European Union, it should not be important where an arbitration tribunal sits but rather whether some potentially anti-competitive agreements or practices might affect the common market.¹⁵²⁰ EC competition law may be enforced extraterritorially against anti-competitive acts, as long as the latter are implemented or produce their effects inside the EU territory, no matter if they were

¹⁵¹⁷ E.g. Case 107/76, *Hoffmann-La Roche v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, [1977] ECR 957, para. 5 ("in the context of Article [234]...the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law coming into existence in any Member State" - emphasis added); case 283/81, *Srl CILFIT & Lanificio di Gavardo SpA v. Ministry of Health (I)*, [1982] ECR 3415, para. 7 ("Article [234] seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law" - emphasis added).

¹⁵¹⁸ An example is a non-EU arbitral tribunal or the parties to that arbitration requesting an English court to grant certain provisional measures. According to s. 2(4)(b) of the Arbitration Act 1996, the English court has discretion to exercise such a power, if certain conditions are met.

¹⁵¹⁹ If an arbitral tribunal is sitting in a non-EU country, which is a signatory of the 1968 European Convention on Information on Foreign Law, it may theoretically request a court in that jurisdiction to transmit a question on foreign law, presumably also of EC competition law, the latter being part of EU countries' national laws, to a "receiving agency" in an EU Member State. However, there is no way that the receiving agency could seize the ECJ.

¹⁵²⁰ See A. Rigozzi, *L'art. 85 du Traité CE devant le juge civil Suisse : Les contrats de distribution à l'égard de l'art. 19 LDIP et la nouvelle loi fédérale sur les cartels*, Swiss Papers on European Integration, No. 2/96 (Bern/Zürich, 1996), p. 57, who goes even further by suggesting that the Commission, in order to assure the effectiveness of EC competition enforcement, should also entertain requests of assistance by Swiss courts.

concluded in or directed from a third country. By the same token, if there is an on-going arbitration outside the European Union, and if an issue arises pertaining to EC antitrust law, it would be rather contradictory for the Commission to deny access to its resources to such an arbitral tribunal. The Commission should entertain such a request without examining the nationality of the arbitrators and parties involved or the applicable law of the dispute (*lex causae*). The only concern must be whether there is a genuine dispute, which *prima facie* relates to conduct potentially caught by the EC antitrust rules.

c. Arbitration and Member States Courts

While arbitration tribunals apply EC competition law, they may also turn for assistance to national courts. It is common ground that arbitral proceedings in any given legal system are dependent on state courts. Notwithstanding a certain global trend of de-localisation and autonomy of arbitration¹⁵²¹ - in particular of international commercial arbitration - a certain dialogue with the state judicial power is unavoidable. The balanced relationship between courts and arbitrators is considered to be one of the key criteria for the attractiveness of an arbitration site.¹⁵²² The complementarity between courts and arbitrators basically centres in two diverse circumstances: review and assistance.¹⁵²³ An arbitral award is reviewed by state courts either in the context of a setting aside motion, when a party to arbitration requests the annulment of the award, or in respect of a request for recognition and enforcement. Assistance, on the other hand, takes place before the rendering of the award and during the arbitration proceedings. Only the latter instance of court intervention will be examined here, because it is only during the arbitral proceedings that the question of assistance arises.

The state courts' intervention during that stage usually takes place in order to remedy the arbitrators' lack of power of coercion, which is attached to state prerogatives. It is true that arbitrators possess some powers, which may serve as satisfactory alternatives to the courts'

¹⁵²¹ See Theofrastous, *supra* (1999).

¹⁵²² See Berger, "Das neue Schiedsverfahrensrecht in der Praxis: Analyse und aktuelle Entwicklungen", 47 RIW 7 (2001), p. 17.

¹⁵²³ On the complementary roles of judges and arbitrators see e.g. Delaume, "L'arbitrage transnational et les tribunaux nationaux", 111 JDI (*Clunet*) 521 (1984); Goldman, "The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective", in: *International Arbitration, 60 Years of ICC Arbitration, A Look at the Future*, ICC Court of Arbitration (Paris, 1984); Kerameus, "The Examination of an Arbitration Agreement by State Courts while Arbitration Is Pending", 42-43 RHDI 217 (1989-90); Carpi, "Les rapports entre l'arbitrage et le juge ordinaire", 2 ZZPInt. 397 (1997); P. Sanders, *Quo Vadis Arbitration?, Sixty Years of Arbitration Practice, A Comparative Study* (The Hague/Boston/Dordrecht, 1999), p. 18 *et seq.*; Ball, "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration", 22 Arb.Int'l 73 (2006), p. 74 *et seq.*

sovereign authority.¹⁵²⁴ They issue instructions to the parties by means of procedural orders, they may summon witnesses and order the production of documents - in some jurisdictions by means of subpoenas, they may even impose fines for the parties' default, or they may draw the appropriate consequences of a party's failure to comply with a procedural order. However, there are those instances, where the intervention of a state court is indispensable. State courts may, thus, intervene to assist the formation and composition of the arbitral tribunal against a defaulting party, usually in *ad hoc* arbitrations. Recourse to state courts of the seat of arbitration might also be called for in obtaining provisional and conservatory measures. Although the modern trend is that arbitral tribunals can grant provisional measures themselves,¹⁵²⁵ there are still jurisdictions, where this is not possible.¹⁵²⁶ Then, there are those measures that are inherently connected with the state power of coercion, such as attachment, that again may have to be granted by state courts only.¹⁵²⁷

Provisional measures might be necessary to be taken in a foreign jurisdiction, different from the one of the seat of arbitration. This transnational element is very likely to exist in a dispute involving EC antitrust issues. Such measures can only be ordered by the state courts of that jurisdiction, on the condition that they are allowed by their procedural law to offer such assistance.¹⁵²⁸ Such an exceptional possibility exists under Regulation 44/2001, which applies also to provisional and protective measures, even in case of arbitral proceedings that have been or may be commenced in another signatory country.¹⁵²⁹ The UNCITRAL Model Law does not expressly exclude that interim measures could be ordered by a state court in aid of a

¹⁵²⁴ See Goldman, *supra* (1984), p. 276 *et seq.*; Derains, "State Courts and Arbitrators", in: *Arbitration in the Next Decade - Special Supplement 1999*, The ICC International Court of Arbitration Bulletin (Paris, 1999), p. 27.

¹⁵²⁵ See Art. 17 of the Model Law. Indeed, arbitrators are nowadays considered to have the power even to grant anti-suit injunctions. See further Lévy, "Anti-suit Injunctions Issued by Arbitrators", in: Gaillard (Ed.), *Anti-suit Injunctions in International Arbitration, LAI Seminar (Paris - November 21, 2003)* (New York/Bern, 2005), p. 116 *et seq.*; Mourre, "Granting Interim Relief Measures: Order or Award?", Paper Presented at 8th IBA International Arbitration Day Conference (Geneva, 18 March 2005), p. 3 *et seq.*

¹⁵²⁶ This is so, for example, under Italian law (Art. 818 of the Code of Civil Procedure).

¹⁵²⁷ See e.g. Fouchard, Gaillard, Goldman, *supra* (1999), p. 711 *et seq.*

¹⁵²⁸ See on this question Steinbrück, "German and English Court Orders in Support of Foreign Arbitrations", 6 EBOR 313 (2005), p. 320 *et seq.*

¹⁵²⁹ See also Art. 24 of the Brussels Convention as interpreted by the ECJ in case C-391/95, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line et al.*, [1998] ECR I-7091, at I-7132, paras. 28-34. According to the ECJ, "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect ... It must therefore be concluded that where ... the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators" (*Van Uden, op.cit.*, paras. 33-34, emphasis added). See now Art. 31 Reg. 44/2001.

foreign arbitration, but there are currently plans to provide expressly in the Model Law that a state court will have the power to issue interim measures of protection, irrespective of the country where the arbitration took place.¹⁵³⁰

More importantly, the taking of evidence is another instance of state courts' intervention. Again arbitral tribunals are usually in the position to order the production of documents that are in the possession of the parties. Depending on the procedural law, they may also summon the parties to provide any relevant evidence and to that effect they may also issue procedural injunctions and even attach penalties thereto. However, it is recognised that, since arbitrators lack *imperium*, their procedural orders are less effective than those of the courts.¹⁵³¹ Furthermore, the privity of the arbitration agreement and procedure means that third parties cannot be compelled by arbitrators to produce evidence or to give witness testimony.

Arbitral tribunals dealing with EC competition law might be more dependent on the assistance of state courts. Antitrust disputes invariably involve third parties (e.g., trade associations, other competitors, etc.). Therefore, evidence in order to prove conspiracies or to determine market power as far as these third parties are concerned will always be a weakness of arbitration, which necessarily can be remedied only through the intervention of the ordinary courts.¹⁵³²

Court intervention in order to assist arbitral tribunals in the taking of evidence may also be necessary if the evidence is situated in a third country, something which is the rule rather than the exception in cases involving EC competition law. In this case the courts of the place of arbitration - and not the arbitrators themselves - may request the assistance of foreign courts or of foreign judicial authorities.¹⁵³³ In the intra-EU context, Regulation 1206/2001 excludes the direct possibility of arbitration tribunals to seize other Member States' courts to take

¹⁵³⁰ See UNCITRAL, Working Group II (Arbitration), Thirty-ninth Session (Vienna, 10-14 November 2003), *Note by the Secretariat, Settlement of Commercial Disputes, Interim Measures of Protection*, paras. 40-43.

¹⁵³¹ See Fouchard, Gaillard, Goldman, *supra* (1999), pp. 697 and 727 *et seq.*

¹⁵³² On third party evidence in arbitration see e.g. Webster, "Obtaining Evidence from Third Parties in International Arbitration", 17 *Arb.Int'l* 143 (2001).

¹⁵³³ See in particular M. Rubino-Sammartano, *International Arbitration Law and Practice* (The Hague/London/Boston, 2001), p. 399. The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters does not apply to arbitrators, although it appears that in *ad hoc* cases some of the signatory states have granted judicial assistance directly to foreign arbitral tribunals (see C. Bühring-Uhle, *Arbitration and Mediation in International Business, Designing Procedures for Effective Conflict Management* (The Hague/London/Boston, 1996), p. 67). We should also note that, under US law, arbitrators would probably qualify as "tribunals" in the sense of s. 1782 (United States Code 28 U.S.C. 1782), which allows US courts to order discovery of evidence within their jurisdiction for use in proceedings before a foreign or international tribunal. This appears to have been accepted implicitly also by the US Supreme Court in the recent *Intel* case (see above). Compare Wessel, "A Tribunal by Any Other Name: US Discovery in Aid of Non-US Arbitration", 8 *Int.ALR* 139 (2005), p. 145.

evidence on their behalf,¹⁵³⁴ but a balanced reading of that Regulation would leave it open to arbitration tribunals to make such requests via the state courts of the Member State on which they sit and their *juge d'appui*, who could then have recourse to that Regulation.

5. Conflicts of Resolution and the *ultimum refugium* of the Public Policy Nature of EC Competition Law

a. Resolution of Conflicts

aa. Scenarios of Conflicts

Arbitration tribunals, just as national courts, enjoy parallel competences in the application of the Treaty competition rules with the Commission (and other national competition authorities). Such parallel competences may give rise to conflicts of resolution. We must note, however, at the outset that the existence of such conflicts between arbitration and the Commission do not give rise to the same concerns and issues arising with regard to national courts. While conflicts between national judicial authorities and the Community institution *par excellence* responsible for antitrust enforcement in Europe are also seen as undesirable in terms of legal certainty, the main concern is however related to the more fundamental inherent features of the supranational structure of the European Union. In other words, as we have explained in detail above, such conflicts are seen in the context of the perennial struggle between the Community and the national element. Article 10 EC, the principle of effectiveness of Community law and the specific principles of *Masterfoods* and Article 16 of Regulation 1/2003, must therefore all be seen in this context of supranationalism. The fundamental principle is that national organs must pay due respect to Community organs, national law must always give way to Community law, national interests should be superseded by the Community interest.

Arbitration tribunals, on the other hand, are not organs of the Member States. They are a creation of private autonomy and constitute a method for the resolution of disputes among individuals. Their aim is to give right or wrong to the parties and not to safeguard any particular public interest of national or supranational nature. International arbitration

¹⁵³⁴ See Art. 1(2) which provides that “a request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated”. See also Musger, “Taking of Evidence”, in: Council of the European Union (Ed.), *Civil Law, European Judicial Cooperation 2004* (Luxembourg, 2005), p. 193, making clear that arbitration tribunals are excluded.

tribunals, in particular, have no forum and are to a large extent unconnected with specific legal orders. This does not mean that arbitrators are outside the limits of the law. They base their competence on and have to decide pursuant to the arbitration agreement, which itself must be within the limits of the law.¹⁵³⁵ Then, most importantly, their decision, the arbitral award, is subject to a limited yet real review by state courts.

These considerations have to be seriously kept in mind while speaking about conflicts and their resolution in the present context. The position of arbitration tribunals is fundamentally different from that of courts and the court-related conflict resolution mechanisms we described in the pertinent part above cannot be automatically transposed to arbitration.

Thus, an on-going arbitration will not be affected or terminated by the mere fact that the Commission has initiated a proceeding in the same case.¹⁵³⁶ Like with the case of courts, by no means should the initiation of proceedings by the Commission entail the suspension of the arbitral proceedings,¹⁵³⁷ although the arbitral tribunal may wish to stay its proceedings and await the Commission's decision, if it hears the parties in this regard. This is however a rather problematic situation because the primary duty of the arbitrators vis-à-vis the parties is to resolve their dispute and render swiftly an award. A stay of proceedings is therefore something that arbitrators should have recourse to only rarely, when there is a very serious and novel competition law issue in the hands of the Commission or of a national competition authority the resolution of which is forthcoming and is expected to have an impact on the arbitration proceedings. In all such cases, the arbitrators should first hear the parties and aim at ensuring there is consent on their part. Conversely, it is noteworthy that in the past, where an EC antitrust issue had arisen before an arbitral tribunal and one of the parties had also filed a complaint with the Commission, the latter declined to open an enquiry while the arbitration procedure was pending.¹⁵³⁸ Such an approach by the Commission deserves approval.

It should be noted that the introduction of the legal exception system has improved the position of arbitration. Under the previous system of enforcement, arbitral tribunals were at a

¹⁵³⁵ See above on the question of the legality of the arbitration clause itself.

¹⁵³⁶ See Dalhuisen, "The Arbitrability of Competition Issues", 11 *Arb.Int'l* 151 (1995), p. 160; Idot, *supra* (1996), p. 573. See also Hetsch, "Arbitration in Community Law", 6(2) *ICC Bull.* 47 (1995), p. 55, who stressed the fact, that under the old system of enforcement, Art. 9(3) Reg. 17/1962 applied neither to courts nor to arbitrators, therefore the latter had jurisdiction, even if there was a parallel proceeding at the Commission. This point is still valid today.

¹⁵³⁷ Opinion by Marc Blessing, expressed during the discussions at the IAI conference on "Les réformes du droit communautaire de la concurrence et l'arbitrage international : un nouveau rôle pour les arbitres ?" on 4 October 2002 in Paris.

¹⁵³⁸ See ICC arbitral award in case n° 7181/1992, published in: XXI *YCA* 99 (1996). See on that case Verbist, "The Application of European Community Law in ICC Arbitrations, Presentation of Arbitral Awards", in: *International Commercial Arbitration in Europe - Special Supplement 1994*, The International Court of Arbitration Bulletin (Paris, 1994), p. 43 *et seq.*

very disadvantageous position when an agreement falling under Article 81(1) EC had been notified to but not yet exempted by the Commission. While the arbitrators could still stay proceedings and wait for the Commission's decision, while possibly seizing - or soliciting the parties to seize - the Commission, in order to induce it to reach a timely conclusion, such a deviation of the arbitral proceedings, likely to last for very long periods until the Commission moved to decide how to proceed with the notification, was certainly in conflict with the most fundamental principles of arbitration, namely the principles of privity, confidentiality and swiftness. This explains a certain hesitation of arbitrators to follow this time-consuming route in the past.¹⁵³⁹ The new system of enforcement, which is one of fully parallel competences, means a welcome departure from these problems.

Proceeding now to the examination of possible corrective measures to remedy conflicts of resolution, when the Commission proceeds and finds that a particular arrangement is contrary to the Treaty competition provisions, arbitrators cannot be formally bound by Article 16 of Regulation 1/2003 to avoid a conflicting decision with the Commission. This is so, because this rule is a *lex specialis* of the more general provision of Article 10 EC and arbitrators are immune from any duties emanating from that provision. Notwithstanding the absence of a formal duty to that extent, the arbitral tribunal will have to be cautious, particularly when the case entails some kind of hard core behaviour. Thus, if the Commission has taken a decision finding an infringement of Article 81 EC in the case of a hard core cartel, in reality that Commission decision imposes *de facto* a duty of vigilance upon the arbitral tribunal. The latter remains theoretically empowered to depart completely from the findings of the Commission and find that there has been no cartel infringement based on the same facts. The arbitral award would still enjoy *res judicata* as between the parties,¹⁵⁴⁰ but, at the same time, it would be highly vulnerable to an annulment action, which the losing party would not certainly miss to exploit.

Such an award would essentially amount to a truncated award. It is clear that the arbitrators cannot and, indeed, should not proceed in such a controversial manner, thus compromising the effectiveness of their award and their credibility as arbitrators as well as the credibility of arbitration as a respectable dispute resolution method. If they do so, the arbitrators may also breach the legal or moral principle that they should render an award that is *prima facie* enforceable. In extreme cases, it could well be argued that the arbitrators would be in breach

¹⁵³⁹ See Burrichter, *supra* (2001), p. 543. Indeed, as mentioned above, there is anecdotal evidence that in the past arbitral tribunals chose to hear argument on Art. 81(3) EC and addressed in their awards many of the points pertaining to that provision.

¹⁵⁴⁰ See Dalhuisen, *supra* (1995), p. 161.

of their contract with their clients, since the latter would have paid for services fundamentally flawed and defective.

Of course, even in the case of a Commission or an antitrust authority decision finding a cartel infringement, the above does not mean that the arbitrators should be totally bound by all findings in the Commission's decision. Indeed, there is no reason to deny them the possibility to depart from certain findings, if they evaluate the evidence differently or if they have additional evidence in their hands. Thus, even in such extreme cases, an arbitrator could find a different duration of the cartel or a different degree of participation in the cartel by a specific company. Such an award will not in reality contradict the Commission in its most fundamental findings, but would rather depart from them in certain aspects. It is difficult to see how such an award would be contrary to public policy, if it has found that there has been in principle a cartel infringement, but has rather arrived at some findings that may contradict some secondary findings of the Commission decision. At most, the award will have committed an error, but review of arbitral awards' errors would amount to *révision au fond* and should therefore be excluded.¹⁵⁴¹

If the case involves some behaviour that does not amount to a hard core violation of competition law, the arbitrators have more liberty to depart from the Commission's findings, since an arbitral award that contradicts such a Commission decision would run less of a risk at the enforcement stage.¹⁵⁴² This does not mean that such an award should be seen as perfectly secure. The arbitrators would still have to exercise a certain degree of caution if they want to depart from the findings of the Commission. For example, a blatant refusal to follow the Commission in finding illegal a 20-year non-competition clause in a contract that has no particular elements that could justify such duration, should not be a step easy to take for the arbitrators, who should know that again their award would be highly vulnerable. Although the conduct in question does not amount to a hard core violation of competition law, it would still be far-fetched to consider such an award safe.

If, on the other hand, there is different approach between the Commission and an arbitration tribunal as to the interpretation of one of the criteria of Article 81(3) EC or as to the evaluation of certain conduct in the context of rule of reason under Article 81 or 82 EC, then the fact that Article 16 of Regulation 1/2003 and the *Masterfoods* principles do not apply to arbitration must mean that the arbitrators are not bound as such to follow the Commission's

¹⁵⁴¹ See in the same direction, Radicati di Brozolo, "Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the 'Second Look'", 7 Int.ALR 23 (2004), p. 29, fn. 28.

¹⁵⁴² See below.

decision.¹⁵⁴³ The fact that the conflict of resolution will centre around a non-hard core restriction of competition or around a different evaluation of the rule of reason, would most likely make the arbitral award in this case immune from annulment, since if the more correct approach is followed, such an award cannot be said to violate public policy.¹⁵⁴⁴

In other words, public policy comes into play only with regard to a serious violation of *substantive* competition law and not with regard to the existence of a conflicting award, which is more a *procedural* question.¹⁵⁴⁵ The public policy nature of a rule is a different matter from the binding effect of a decision of an authority or court over the arbitration tribunal. Indeed, the Court of Justice's *Eco Swiss* ruling, which declared the public policy nature of the Treaty competition rules, was based on the concern to ensure that no anti-competitive effects occur on the market. It was not the Court's concern whether a decision by the Commission binds an arbitration tribunal. The fact that an arbitration tribunal has the power, if it wishes, to depart from the findings of a Commission decision does not mean that the tribunal will surely violate the competition rules or that its award will surely violate public policy. In other words, it is the arbitral award that changes the legal reality and must thus be examined whether it violates public policy, and not the decision of the arbitrators to depart from or to follow a Commission decision.

On the contrary the situation is different in case of "over-application" of EC competition law by arbitrators,¹⁵⁴⁶ i.e., when arbitrators consider that a certain agreement infringes the antitrust provisions. In those circumstances certainly the arbitral award would *a fortiori* enjoy a *res judicata* effect *inter partes* and it would be very unlikely for the Commission to intervene with a contradictory inapplicability decision. This could happen in rather special circumstances, when the Community public interest would so require.¹⁵⁴⁷ It would also seem unlikely for such an award to violate public policy and to consequently be exposed to annulment.¹⁵⁴⁸

¹⁵⁴³ Neither Regulation 1/2003, nor the *Masterfoods* principles cover decisions adopted by NCAs in the framework of the ECN (see above). At the same time, as discussed above, neither Article 10 EC, nor Article 16 Reg. 1/2003, nor *Masterfoods* apply to arbitration. Therefore, *a fortiori*, decisions by NCAs that act in the framework of the ECN do not bind arbitration tribunals as a matter of Community law.

¹⁵⁴⁴ See again below on this question.

¹⁵⁴⁵ Since we deal here with conflicts of resolution between arbitration tribunals and the Commission, we do not discuss the complete failure of an arbitration tribunal to take into account competition law or its oversight in this respect. We rather deal here with the power of arbitrators to depart from Commission decisions, which means the arbitrators are already aware of the competition problem. On the former question, see below.

¹⁵⁴⁶ See P. Schöldström, *The Arbitrator's Mandate, A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Sweden and Switzerland* (Stockholm, 1998), pp. 303-304.

¹⁵⁴⁷ See Art. 10 Reg. 1/2003.

¹⁵⁴⁸ See Schöldström, *supra* (1998), p. 304.

bb. Direct Intervention by the Commission against Arbitral Proceedings and Awards

Apart from the possibility of judicial review of arbitral awards, competition law is an area where there are exceptionally some other tools to deal with egregious violations of the law by arbitrators. The Commission being a public authority with increased powers to compel and punish could use such powers directly against arbitration. Indeed, as mentioned above, in its *Organic Peroxides* Decision did not shy away from fining a cartel facilitator which had acted as a secretary to the parties and facilitated the implementation of the agreement. In the extreme case where an arbitration tribunal would act merely as an internal structure of the cartel, whose function would be to ensure compliance with the cartel and to discipline cartel members that “cheat” on the cartel’s decisions, there is no valid reason why the “arbitrators” should not be subject to the full powers of the Commission as well as to penalties.¹⁵⁴⁹

Bar these extreme cases, an arbitral award that confirms an anti-competitive agreement cannot, however, be itself subject to Article 81 EC.¹⁵⁵⁰ Notwithstanding the contractual basis of arbitration, an arbitral award is not an agreement between parties. It is an act of quasi-judicial nature rendered by one or more independent third persons, who act as private judges. The arbitral award’s object or effect is not to restrict competition as such, but rather to resolve a dispute that has been submitted to the arbitrators. In other words, what may be the subject of prohibition is not the arbitral award, but the agreement itself, as interpreted by the arbitration tribunal.¹⁵⁵¹ Thus, the European Commission does not have the power to directly attack the arbitral award or to seek its review before the state courts. Again the principle of privity of arbitration advocates against such a solution.¹⁵⁵² Indeed, it is not usually allowed for third parties to request the setting aside of an arbitral award (*tierce opposition*). In addition, the principle of separation of powers should also by analogy stand in the way of a direct review of the arbitral award by the Commission. If the Commission does not have such powers vis-à-vis national state courts, there is no reason to depart from that rule in the case of arbitration, which is also a dispute resolution mechanism and is recognised as such by Member States’ courts and laws.

¹⁵⁴⁹ See above on some early cases.

¹⁵⁵⁰ See above.

¹⁵⁵¹ See Sucker, Guttuso and Gaster, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), p. 787.

¹⁵⁵² See Betto, Fry, Henry, Kleiman and Pinsolle, *supra* (2006), p. 378.

There are in fact other indirect ways for the Commission to attain the same objective by having recourse to less dramatic means that constitute less of an intrusion to national procedural autonomy and less of an affront to an institution of global importance, recognised as such by international treaties and international custom. Thus, this indirect route has been used once in the past by the Commission in the *Preflex/Lipski* case.¹⁵⁵³ The facts were that an arbitral award had required that the defendant continue to pay license fees pursuant to a patent licensing agreement after the expiry of the patents. The Commission held that this agreement as interpreted by the arbitral award, which in fact had even been subsequently approved by a national court,¹⁵⁵⁴ was incompatible with the Treaty competition rules. It did not, of course, set aside the arbitral award or - obviously - the national court's judgment, since this is not possible under Community law. It did, however, communicate its objections to the parties and in essence rejected the construction given by the arbitral tribunal to the problematic contractual clause.¹⁵⁵⁵ As a result, the parties complied with the Commission's views and reached a settlement, thus putting an end to the dispute.

Such a Commission practice can have far-reaching consequences in like situations. Essentially, it could mean that each party to an agreement can, at least indirectly, bring an arbitral award before the Commission, by filing a complaint with it, hoping that the Commission will in effect enjoin the parties from enforcing the agreement, if the latter, as construed by the award, is found to be incompatible with EC antitrust rules. The result is that the *res judicata* effect of the arbitral award in question will be only nominal.

Admittedly, however, such an - indeed remote - possibility can be a powerful deterrent and corrective mechanism for arbitrators in appropriate cases. This may be so, where the arbitral award manifestly disregards EC competition law, for example by upholding a *per se* anti-competitive conduct, such as a blunt market sharing or price fixing agreement, and when it is apparent that the parties had submitted their dispute to arbitration in order to evade the application of Community competition law. Of course, it is likely that the Commission will intervene only in those cases where the enforcement of the arbitral award by the parties can be expected to have serious anti-competitive effects on the market. A Commission

¹⁵⁵³ See *Commission Xth Report on Competition Policy - 1980, op.cit.*, para. 126, pp. 87-88. See also above.

¹⁵⁵⁴ Civ. Bruxelles, 15-10-75, *Preflex SA v. Lipski*, 91 JdT 493 (1976). The *Tribunal de première instance* of Brussels rejected an action to have the award set aside, because, after dealing with the EC competition issue, it concluded that no infringement had taken place.

¹⁵⁵⁵ See further on that case De Mello, "Arbitrage et droit communautaire", (1982) *Rev.Arb.* 349, pp. 373-374; Idot, "Judicial Control and Enforcement of the Arbitral Award: Rapport introductif", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993), pp. 280-281; Bos, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 425.

intervention to enjoin the parties from enforcing a final arbitral award, especially after a national court has sanctioned an arbitral award, should be a rare course, to be taken only if there is at stake a strong Community public interest necessitating intervention, and not just the individual interest of the losing party of the arbitration.¹⁵⁵⁶ The Commission should not, therefore, allow itself to be considered as an “appeal tribunal” in such arbitrations but should leave this to the initiative of the losing party and to the courts to remedy pursuant to the applicable civil procedures.

b. The *ultimum refugium* of the Public Policy Nature of EC Competition Law

Quite apart from any other preventive or corrective mechanism for the effective application of the Treaty competition provisions by arbitrators, review by state courts constitutes the most effective control. EC competition provisions express the fundamental economic system of the Community and of its Member States and enjoy, therefore, a public policy (*ordre public*) character. Arbitral tribunals must seriously take this into account, or else their awards could risk being either set aside or refused recognition and enforcement at least in the EU territory. Although there is now a very clear trend to limit any appeal or recourse against arbitral awards, the public policy proviso still remains and will remain in the foreseeable future a basis for the non-recognition/non-enforcement or the annulment of awards offending against the fundamental principles of a legal, social and economic system. It has been called an “appeal through the back door”,¹⁵⁵⁷ but it is, we submit, its mere existence and its deterrent effect that matters rather than its actual putting in effect by state courts, which is rare in practice.

aa. The Notion of Public Policy

The notion of public policy is connected with generally binding patterns of social or economic behaviour that, up to a considerable extent, form the very basis of the legal, social, political and economic system. A systematic analysis of that concept lies outside the scope of this study but it suffices in this context to say, at the risk of oversimplifying fine theories, that

¹⁵⁵⁶ See Temple Lang, “Panel Discussion: International Arbitration”, in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 426.

¹⁵⁵⁷ See Berger, “The Modern Trend towards Exclusion of Recourse against Transnational Arbitral Awards: A European Perspective”, 12 *Fordham Int’l LJ* 605 (1988-89), p. 638 *et seq.*

there are two ways in which legal systems use the technical term public policy or *ordre public*. Firstly, in mostly continental legal systems public policy is used to designate internally binding rules that cannot be set aside by private autonomy, i.e. rules that the parties cannot contract out of. A specific term used to refer to these rules is *ius cogens*. This notion of public policy is both broad and narrow. Broad, because it covers an extensive spectrum of national legal provisions, which the law itself expressly or implicitly considers mandatory, and which the parties to a contract cannot set aside, as opposed to those rules, of which the parties can contract out (*ius dispositivum*). However, it is also narrow, in the sense that it cannot necessarily affect the parties' choice of a foreign law, although the application of the latter may lead to legal consequences that are incompatible with binding national legal provisions of a *ius cogens* character. This concept of public policy which, we stress again, functions only internally refers to substantive law. There is however a corresponding notion of roughly the same breadth that refers to procedural law. This is basically the public policy that refers to the recognition of a domestic legal instrument or of a domestic arbitral award. This notion of public policy is broader than the equivalent one referring to the recognition of foreign judgments and arbitral awards.

Secondly, public policy or *ordre public* is used - not only in continental legal systems - in order to refer to certain important rules or principles of the national legal order that cannot be set aside by the application of a foreign law, or by the recognition or enforcement of a foreign judgment or arbitral award. This is the private international law (conflict of laws) concept of public policy and it refers to the most fundamental rules and principles that reflect the political, moral, social, and economic structure of a given country at a given time. As such, public policy in this sense is narrower than the previous notion, since not all internally mandatory rules can claim that they express the fundamental values of a given state.¹⁵⁵⁸

There is a further distinction to be made here. Some legal systems distinguish between public policy in the *stricto sensu* conflict of laws context and public policy in the context of enforcement of foreign judgments and awards. In such cases, the public policy involved is called "international public policy" (*ordre public international*), which is in reality a misnomer because this public policy is anything but international. In reality it is again the public policy of a specific state but functions minimalistically only in those cases where the enforcement of a foreign judgment or arbitral award is sought. It is accepted in theory that such a notion is less demanding and restrictive than the conflict of laws public policy. *Ordre*

¹⁵⁵⁸ The opposite is, however, true. It is very likely that all rules expressing public policy in the private international law sense constitute also internally mandatory rules in the *ius cogens* sense.

public international refers, in other words, to the recognition and enforcement of a legal instrument, which is already in existence according to the rules of a foreign jurisdiction. The public policy of the state of recognition or enforcement, therefore, is less offended, than it would be if that instrument were created in that same state.¹⁵⁵⁹

That a notion of Community public policy (*ordre public communautaire*) exists, albeit integrated in the respective national notions, is a logical consequence of the autonomy of the Community legal system but also of the fact that Community law forms an integral part of each national law.¹⁵⁶⁰ The existence of such notion has been accepted by national courts, which have indicated, that, in the examination of an *ordre public* violation, Community mandatory provisions such as Articles 81 and 82 EC have to be taken into account, because they form part of the national public policy notion.¹⁵⁶¹

bb. *Eco Swiss*

The *ordre public* nature of the EC competition provisions and the duty of EU Member State courts to review and set aside arbitral awards that violate those fundamental provisions were forcefully pronounced in the *Eco Swiss* judgment of the Court of Justice of June 1999, rendered in a preliminary reference from the Dutch Supreme Court.¹⁵⁶²

¹⁵⁵⁹ This is the so-called theory of the "diluted effect of public policy" (or of the diluted effect of the exception of public policy, to be terminologically more correct), of the *ordre public atténué de la reconnaissance* or of the *effet atténué de l'ordre public*. This theory has French origins, but is also widely accepted out of France and, in the Brussels Convention context, it has been endorsed by AG Darmon in case 145/86, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, [1988] ECR 645 at 668. See, in the general context of recognition and enforcement of foreign judgments, Kerameus, "Enforcement in the International Context", in: 264 *Recueil des Cours* (1997) 179, p. 360, and in the context of the old Brussels Convention, R. Geimer and R.A. Schütze, *Europäisches Zivilverfahrensrecht, Kommentar zum EuGVÜ und zum Lugano-Übereinkommen* (München, 1997), pp. 458-459.

¹⁵⁶⁰ This is also accepted in the context of the 1968 Brussels Convention. According to the commentaries, the national public policy notions of Art. 27(1) of that Convention include also Community public policy. See e.g. Geimer and Schütze, *supra* (1997), p. 464; see also paras. 66-67 and 86 of AG Alber's Opinion in case Case C-38/98, *SA Régie Nationale des Usines Renault v. Maxicar SpA and Orazio Formento*, [2000] ECR I-2973. The same must now be accepted with regard to Art. 34(1) Reg. 44/2001. In the context of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, according to the accompanying Giuliano-Lagarde Report, it goes without saying that the public policy notion of Art. 16 of this Convention includes Community public policy, which has become an integral part of the *ordre public* of the Member States (OJ [1980] C282, p. 38).

¹⁵⁶¹ See above. This sensible approach does not seem, on the other hand, to be followed by the Commission's recent "Rome II" regulation proposal on the law applicable to non-contractual obligations (cited *supra*), which in Arts. 22 and 23 distinguishes between national and Community public policy exceptions. This is probably due to poor drafting rather than to a deliberate decision on this point. In any event, the fact that Community public policy is integrated into national public policy is but a direct consequence of the nature of Community law, which is not something separate of or foreign to national law, but rather integrated thereto.

¹⁵⁶² Cited *supra*. For commentaries of that case see *inter alia* Idot, (1999) Rev.Arb. 639; Radicati di Brozolo, *supra* (1999), p. 665 *et seq.*; Komninos, 37 CMLRev. 459 (2000); Weyer, "Gemeinschaftsrechtliche Vorgaben für das nationale Zivilverfahren: Verpflichtung der nationalen Zivilgerichte zur Anwendung der Art. 81, 82

The facts of this case date back to 1986, when a licensing agreement was signed between on the one hand Benetton International, a Dutch company established in Amsterdam, and on the other hand Eco Swiss China Time, a Hong Kong company, and Bulova Watch, a company established in the United States. According to the contract, Benetton granted Eco Swiss the right to manufacture and sell watches using the words "Benetton by Bulova". The agreement provided for a complicated market sharing arrangement, the net result of which was that Eco Swiss was precluded from selling in Italy, whereas Bulova was precluded from selling in all other Member States of the then EEC. The licensing agreement¹⁵⁶³ included an arbitration clause, according to which all disputes were to be settled by arbitration in accordance with the rules of the Netherlands Arbitration Institute and the applicable law was to be Dutch law. In 1991, Benetton unilaterally terminated the agreement prematurely and the matter was referred to arbitration. As a result of the arbitration, there were two arbitral awards rendered: an interim (partial final) award in 1993 and a final arbitral award in 1995. The interim award found Benetton liable for breach of contract and the final one awarded Eco Swiss damages as a result of Benetton's breach. Benetton commenced a series of proceedings to resist the enforcement of the arbitral awards. Among these proceedings, those of interest to the present case are the application under Article 1065 of the Dutch Code of Civil Procedure (DCCP) to the District Court of The Hague seeking an annulment (*vernietiging*) of both arbitral awards, and the connected application under Article 1066 DCCP to suspend enforcement of the final arbitral award until a final decision is made on the application for setting aside. In both proceedings the main argument of Benetton was that the arbitral awards by upholding and seeking to enforce an anti-competitive market-sharing agreement, which was void under Article 81(2) EC, were contrary to EC competition law and, thus, to *ordre public*, the violation of which constitutes under Dutch law one of the grounds for the setting aside of an arbitral award. It is in the context of the second proceedings, the suspension proceedings, that the case reached the European Court of Justice.

The *Hoge Raad* was basically concerned with the following questions: Under Article 1065(1)(e) DCCP an arbitral award can be set aside, if it violates public policy (*ordre public*). That would be the case, where the award is incompatible with fundamental mandatory rules, but, according to the Dutch Supreme Court, the simple disregard of Dutch competition law, as it then stood, would not generally qualify as an *ordre public* violation. There were though

EGV", 35 EuR 145 (2000); Poillot-Peruzzetto, *supra* (2000), p. 299 *et seq.*; Liebscher, "European Public Policy: A Black Box?", 17(3) JInt'l Arb 73 (2000).

¹⁵⁶³ The agreement was never notified to the European Commission, nor was it covered by a block exemption, as it appears from the findings of the Court of Appeal of The Hague.

some doubts if such also were the conclusion, when EC competition law was at stake.¹⁵⁶⁴ Another question was that, since none of the parties had raised the EC competition law issue during the arbitral proceedings, the arbitral tribunal did not deal and could not have dealt with it *ex officio*, because in such a case it would have decided *ultra petita* and this would have consequently rendered its award liable to be set aside by virtue of Article 1065(1)(c) DCCP. These rules, according to the *Hoge Raad*, were justified by the general interest in the effective administration of arbitral proceedings and they were not more unfavourable to the application of Community law, than to the application of national law. However, the referring court was still in doubt as to whether these procedural rules, as applied in arbitration, might be compatible with Community law. Its doubts were based on the *Nordsee* ruling, which had denied access under Article 234 EC to arbitrators, but, by way of set-off, had entrusted national courts, while they exercise their supervision and review powers over arbitration, with the task to ensure that a preliminary question on Community law reaches Luxembourg, if need be.

The Court's judgment has been criticised for having been decided only from a Community law angle, without introducing into the debate any examination of the specificity of arbitration or of issues of private international law.¹⁵⁶⁵ This is a valid criticism more with regard to the Advocate General's Opinion.¹⁵⁶⁶ In our view, the Court in *Eco Swiss* managed rather well to tackle the real problems connected with arbitration and EC competition law, which basically were the extent of a national court's control over arbitral awards, the *ordre public* nature of EC competition provisions and the duty of arbitrators to apply such provisions even *ex officio*.

In dealing with the extent of review of arbitral awards the Court recognised the legitimate interest of Member States that such review be limited. However, in view of the fundamental importance of Article 81 EC and having regard to the necessity of a uniform and effective application of Community competition law, something which under Article 10 EC only national courts can safeguard, it went on to stress that such national courts were under a duty

¹⁵⁶⁴ The *Hoge Raad* referred in that respect to *Van Schijndel*, *op.cit.* According to that case, national courts are under a duty to apply *ex officio* binding rules of Community law, such as EC competition law, unless national procedural principles (such as the passivity of justice in civil litigation) do not allow this (see above). The Dutch Supreme Court's own interpretation of that case was that EC competition provisions were not to be regarded as mandatory rules of such a fundamental nature that could substantiate a public policy violation.

¹⁵⁶⁵ See Blaise and Idot, "Chronique concurrence (année 1999)", 36 RTDE 741 (2000), p. 791.

¹⁵⁶⁶ See Komninos, 37 CMLRev. 459 (2000), pp. 475-476.

to set aside awards that violate the competition rules.¹⁵⁶⁷ Of particular importance was under the Court's reasoning the inability of arbitrators to address Article 234 EC preliminary references on matters of Community law to the Court of Justice as a result of *Nordsee*.¹⁵⁶⁸ It was up to national courts to send such references to Luxembourg, while exercising their review powers over arbitral awards. Obstructive national procedural rules, such as the rule that a party may not raise for the first time issues at a setting aside proceeding, should not, therefore, be followed.¹⁵⁶⁹

With equal approval one has to see the Court's recognition that EC competition rules express a Community public policy, which is integrated in each national notion of *ordre public*.¹⁵⁷⁰ To reach that conclusion the Court stressed the competition provisions' primacy in the Treaty, since "Article 81 constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market".¹⁵⁷¹ Reference was also made to the automatic nullity of all anti-competitive agreements in Article 81(2) EC.¹⁵⁷² It is noteworthy that the Court proceeded to the pronouncement as to the public policy nature of the Treaty competition rules by choosing to refer to the 1958 United Nations New York Convention on the recognition and enforcement of foreign arbitral awards, which in Article V(2)(b) includes a public policy

¹⁵⁶⁷ *Eco Swiss, op.cit.*, paras. 35-37. Even before *Eco Swiss* it was accepted by commentators that a national court was bound by Art. 10 EC not to enforce an arbitral award that was contrary to EC law. See e.g. Arnulf, "References to the European Court", 15 ELRev. 375 (1990), p. 377; Temple Lang, *supra* (1990), p. 649.

¹⁵⁶⁸ *Eco Swiss, op.cit.*, para. 40.

¹⁵⁶⁹ As mentioned above, the possibility of an Art. 234 EC reference has been used as a criterion for the effectiveness of Community law in other cases too, most notably in *Peterbroeck, op.cit.*, paras. 13-21, where it was one of the decisive features that rendered a national procedural rule contrary to EC law. See also De Búrca, "National Procedural Rules and Remedies: The Changing Approach of the Court of Justice", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997), p. 43 *et seq.*; Prechal, *supra* (1998), p. 694.

¹⁵⁷⁰ The *ordre public* character of EC competition law has also been accepted by national courts. In the context of arbitration, the German Supreme Court has affirmed that Art. 81 EC, like German domestic competition law, forms an integral part of German public policy (*öffentliche Ordnung*), and its violation leads to the non-enforcement of an offending arbitral award (BGH, 27.2.69, KZR 3/68 – *Fruchtsäfte*, 19 WuW 504 (1969)). In that case, the arbitration tribunal had awarded damages for breach of contract but the court considered that the absolute territorial protection and the non-competition clauses of the contract were incompatible with EC competition law and therefore the arbitral award violated German public policy. Subsequently, in BGH, 31.5.72, KZR 43/71 – *Eiskonfekt*, 22 WuW 824 (1972), the same court stressed anew the *ordre public* nature of EC competition law, though this time it raised no objection to an arbitral award that was rendered in a case where a French-German exclusive distribution agreement with absolute territorial protection clauses was found not to be appreciable in the sense of Art. 81(1) EC (*de minimis*). For a recent German case see OLG Düsseldorf, 21.7.04, VI-Sch (Kart) 1/02 – *Regenerative Wärmeaustauscher*, 56 WuW 281 (2006). In Austria the *Oberster Gerichtshof* in a judgment preceding *Eco Swiss* has also stressed that Arts. 81 and 82 EC, being fundamental provisions of the single market, also form part of the Austrian *ordre public* (OGH, 23-2-98, 3 Ob 115/95, 40 ZfRV 25 (1999); (1999) Rev.Arb. 385; XXIV YCA 919 (1999)). See also Michaels, "Anerkennung internationaler Schiedssprüche und *ordre public*", 40 ZfRV 5 (1999); Reiner, "Zur Vollstreckung eines Schiedsspruchs nach dem Europäischen Übereinkommen von 1961 trotz Aufhebung im Ursprungsland und zum Umfang der *ordre public*-Kontrolle nach Artt. 81, 82 EGV", 20 IPRax 323 (2000).

¹⁵⁷¹ *Eco Swiss, op.cit.*, para. 36.

¹⁵⁷² *Ibid.*

for non-recognition and non-enforcement of foreign awards.¹⁵⁷³ The Court chose to do this, although it was not requested about this question by the referring court and indeed the New York Convention was not applicable to the case at issue, because the award had been rendered domestically and was subject to a setting aside and not to an *exequatur* procedure in a foreign country. This means that the Court intended to give a positive pronouncement as to the Community public policy nature of the EC competition rules, also in the international context of recognition and enforcement of foreign arbitral awards.¹⁵⁷⁴ The requirement that arbitral awards be submitted to a “communitarised” notion of public policy deserves approval. Any different solution would give rise to an unprecedented forum shopping inside the Community, where parties would opt for the jurisdiction that would be less interposing on arbitral proceedings and awards.¹⁵⁷⁵

Before we conclude,¹⁵⁷⁶ however, a question arises whether this Community public policy is independent of its national counter-part, namely, whether it could still lead to the annulment or non enforcement of an arbitral award, even if the national law in question did not provide for such a ground. *Eco Swiss* states that an arbitral award contrary to Article 81 EC must be annulled by a national court “where its domestic rules of procedure require”¹⁵⁷⁷ the latter to safeguard national rules of public policy. However, this should not be read as meaning that only if the national law provides for a comparable remedy will an arbitral award be annulled for violation of Community public policy. Even in the case where a national law does not provide for a public policy exception, the effectiveness of Community law could still make indispensable a review of arbitral awards on Community public policy grounds.¹⁵⁷⁸

This question may not be purely hypothetical, as one might think at first sight. It is true that public policy exceptions can be found in all legal systems and that even the most advanced proposals within the European Union to create a European judicial area stop short of proposing the abolition of the *ordre public* exception.¹⁵⁷⁹ However, the greater openness towards international arbitration in the last decades and the increasing desire of states to

¹⁵⁷³ *Eco Swiss*, *op.cit.*, paras. 38-39.

¹⁵⁷⁴ In other words, the Court held that even those Member States that follow a restrictive reading of the public policy exception in this context (*ordre public international*) should take into account that in principle EC competition law pertains to that *ordre public international*.

¹⁵⁷⁵ In *Eco Swiss* the Dutch Supreme Court noted that competition law in general would not fall under the Dutch notion of public policy (see *supra*).

¹⁵⁷⁶ We leave for later the Court’s ruling (or non-ruling) on whether arbitrators have a duty to apply EC competition law *ex officio*.

¹⁵⁷⁷ *Eco Swiss*, *op.cit.*, para. 37.

¹⁵⁷⁸ See above on national procedural autonomy and its Community law limits.

¹⁵⁷⁹ Compare, however, the recent *Regulation 805/2004 of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims*, OJ [2004] L 143/15, where an *ordre public* exception is absent and pan-European enforcement of the relevant orders is fully guaranteed.

attract the arbitration business in their territories by enacting arbitration-friendly statutes means that there is an increasing trend in some national arbitration laws to give parties the possibility to waive their rights to apply for the setting aside of the arbitral award.

The few national laws that have followed this course, provide for such a possibility only with regard to international arbitration or when there are no direct links of the arbitration or of its parties with the territory of the respective state. In other words, this is merely an incentive to foreign parties to arbitrate in an arbitration-friendly site. Switzerland was the first country to adopt such a radical pro-arbitration policy, but this was copied up to a certain degree by Belgium and Sweden. The Belgian case is unique in giving the possibility to the parties to explicitly agree in the arbitration clause to waive their right to apply for the setting aside of the award.¹⁵⁸⁰ This possibility seems to cover annulment actions even for serious public policy violation. The Swedish case is different. There, it is possible for the parties with no links to Sweden to agree to limit their right to challenge the award before Swedish courts.¹⁵⁸¹ According to the Swedish courts, mere reference to the ICC Arbitration Rules and to their Article 28(6), as it currently stands, would not suffice, but an express agreement would be necessary.¹⁵⁸² However, this right of the parties to exclude or limit the application of the grounds for setting aside an award does not seem to extend to grounds based on non-arbitrability and public policy. Indeed, under Swedish law it is not possible for the parties to agree to exclude the setting aside of an arbitral award when the latter "is clearly incompatible with the basic principles of the Swedish legal system", a term thought of as referring to public policy.¹⁵⁸³

Whether the Belgian provision is incompatible with the principle of effectiveness of Community law is probably not something that can be answered *in abstracto*. In our view, effectiveness of Community competition law would require a Belgian court to set aside an arbitral award on Community public policy grounds, even if the parties to an international arbitration with no links to Belgium have excluded the possibility of setting aside proceedings, only in very narrow factual situations, when it seems clear that there will be no possibility that the forum of enforcement will pay due respect to EC competition law. To give

¹⁵⁸⁰ Art. 1717(4) *Code Judiciaire*.

¹⁵⁸¹ See s. 51 of the Arbitration Act. On older case law in Sweden in this direction, see Boqvist, "Exécution des sentences arbitrales en Suède", (1991) RDAI/IBLJ 1145, pp. 1164-1165.

¹⁵⁸² Art. 28(6) of the 1998 ICC Arbitration Rules reads: "Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

¹⁵⁸³ S. 51 read in conjunction with s. 33(2) of the Arbitration Act.

a theoretical example, if the Korean and Japanese members of an export cartel with clear anti-competitive effects in the EU territory were to arbitrate for some reason in Belgium a dispute relating to the function of the cartel, the two parties had excluded the possibility of judicial review in Belgium, and the only foreseeable places for the award's enforcement were Korea and Japan, then in those exceptional circumstances if one of the parties were to bring a setting aside action in Belgium, the Belgian court should probably admit his action notwithstanding the agreement to exclude review of the award, because otherwise the effectiveness of Community competition law would be put at risk.

cc. The Public Policy Nature of the Community Rules on Competition

The Court in *Eco Swiss* clearly deduces the *ordre public* character of the competition rules from their fundamental standing in the Treaty of Rome, in particular from Article 3(1)(g) EC. It meticulously stresses the EC competition rules' fundamental significance "for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market."¹⁵⁸⁴ Some commentators have criticised severely the Court's reasoning for relying upon Article 3(1)(g) EC.¹⁵⁸⁵ According to this line of argument, Articles 2 and 3 EC refer in a general and programmatic way to all Community policies and objectives. If they were to signify that these policies and objectives express a fundamental Community public policy, nothing would be left outside that public policy notion.¹⁵⁸⁶

However, this argument fails to recognise the historically "specific" role that the Treaty competition provisions have played in the long course towards the creation of the internal market. The principle of free competition is not just one of the objectives of the Community, but, indeed, one of "the Community's primary objectives as well as one of the major tools through which to maintain and consolidate an integrated and unified European market".¹⁵⁸⁷ EC competition law, in other words, makes up the Union's economic constitution and this has been recognised on numerous occasions by the Community Courts.¹⁵⁸⁸

¹⁵⁸⁴ *Eco Swiss, op.cit.*, paras. 36 and 37.

¹⁵⁸⁵ *Eco Swiss, op.cit.*, para. 36.

¹⁵⁸⁶ See in particular C. Liebscher, *The Healthy Award, Challenge in International Commercial Arbitration* (The Hague/London/New York, 2003), p. 41 *et seq.*

¹⁵⁸⁷ Tesauro, *supra* (2001), p. 259. On the primacy of competition law in the EC Treaty see further Basedow, "Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft", in: Due, Lutter & Schwarze (Eds.), *Festschrift für Ulrich Everling*, Vol. I (Baden-Baden, 1995), p. 49.

¹⁵⁸⁸ See e.g. case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)*, [1985] ECR 531, para. 9: "the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of

Thus, the fact that the Court in *Eco Swiss* referred to Article 3 EC does not of course mean that almost all Treaty provisions have a public policy nature, but rather that the Treaty competition rules have such a standing because of their fundamental status in the Treaty. It should also be noted that sometimes this public policy character has been erroneously attributed not to the substantive nature of the EC competition rules, but to the supremacy and the direct effect of the latter.¹⁵⁸⁹ Such a view would again arrive at the conclusion that almost all provisions of Community law pertain to public policy. This, perhaps good-intentioned, approach is nevertheless erroneous.¹⁵⁹⁰ The sole fact of a provision having direct effect, vertical or horizontal, is immaterial. It is not the direct effect of a Community provision that gives it an *ordre public* character, but rather its normative position in the whole Community legal order.¹⁵⁹¹

Finally, the fact that the Court in *Eco Swiss* engages in an examination of the EC competition provisions in order to declare their public policy character, by also relying on the absolute nullity of Article 81(2) EC, implicitly denies that all provisions of Community law are rules of *ordre public* and should thus be taken into account *ex officio* by national courts.¹⁵⁹² If the Court shared the view that all Community law in general had a public policy character, then the *Eco Swiss* detailed reasoning would have been unnecessary, if not inadequate. In such a hypothetical case the Court of Justice could well have proceeded to a general statement on the *ordre public* nature of EC law, in the national legal orders, which it did not, rightly so.

dd. The Scope of Public Policy Violation

While *Eco Swiss* clearly stated that the Treaty competition rules pertain to public policy, thus disagreeing with the *Hoge Raad* which had essentially held that if it was up to itself, competition rules should not be considered a public policy matter in the context of review of arbitral awards, it left open the question as to the scope of the public policy exception. In

which the Court ensures observance"; *Courage*, *op.cit.*, para. 20: "Article [81] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market" (quoting *Eco Swiss*); cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, [2003] ECR II-435, para. 193: "the competition rules, which are fundamental rules..."

¹⁵⁸⁹ See e.g. Kotsiris, *supra* (2000), p. 383, who considers the public policy nature of EC competition rules from the angle of their supranational and supreme character with regard to national laws.

¹⁵⁹⁰ There have been national judgments that have attributed a public policy character to all Community law because of its direct effect (when such an effect exists) and its supremacy over national law. See e.g. OGH, 23-2-98, *op.cit.*

¹⁵⁹¹ Conversely, the fundamental or public policy character of a Community provision does not make it directly effective.

¹⁵⁹² See, in the same sense, Vilaras, *supra* (2000), p. 40.

other words, the Court did not give a measure as to what exactly constitutes a violation of public policy. It is not clear whether for the Court of Justice *any* violation or misapplication or ignorance of EC competition law would amount to a public policy violation.

In any event, apart from what the Court of Justice thought about this matter, which is at the end of the day only an *ad hoc* issue that national courts are better equipped to deal with, a reply as to what constitutes a public policy violation must take into account various exigencies. Effectiveness of Community law is one, efficiency of competition law enforcement and deterrence is another, but there are also other conflicting interests and principles. Thus, the principle of finality of arbitral awards, the importance of arbitration for commerce within the EU, but also the broader importance of arbitration for the international trade with developing countries which would use Europe's own respect for arbitration as an example for their own attitudes, and other cultural factors must all be taken into account.

There is in fact a split in post-*Eco Swiss* theory between a minimalist and a maximalist approach. According to the first approach, while the EC competition rules pertain to public policy, in practice it will be in extreme cases that an arbitral award will have to be annulled or refused recognition or enforcement. This would be when the arbitrators have put in effect hard core horizontal restrictions of competition that are repugnantly anti-competitive or when the arbitrators have completely ignored EC competition law although it was argued sufficiently clear by the parties, thus rendering an award that refers to a practice clearly anti-competitive. In all other cases there should be no public policy violation, especially if the arbitrators took into account the competition law question yet decided it erroneously. Reviewing arbitral awards for errors, according to this line of argument, would amount to *révision au fond*. The maximalist approach on the other hand relies on the rather general language of *Eco Swiss* and places more emphasis on the Community principle of effectiveness. According to this line of argument, most violations of EC competition law, whose goal is always the protection of public interest, should qualify as public policy violation. Only very slight errors should be excusable and the arbitrators should be cautious when Community law is at stake, perhaps more so than in other comparable situations of national mandatory rules.¹⁵⁹³

In our view, the minimalist approach would be preferable for pure policy reasons. These are:

- (a) Arbitration is not just a creation of private autonomy that merely constitutes an irritant for EC competition law, but is rather a very important transborder mechanism

¹⁵⁹³ The minimalist and maximalist approaches are excellently presented by Radicati di Brozolo, *supra* (2004), p. 23 *et seq.*

bringing commerce and persons together; especially in the context of Community law, arbitration is an important complement of the four freedoms and indeed it is not neglected by the Treaty of Rome. If we can speak of a principle of free movement of judgments, we can also definitely speak of a free movement of arbitral awards.¹⁵⁹⁴

- (b) While the exigencies of Community law must be served, we must not lose sight of the broader picture. In the global context arbitration is one of the most efficient mechanisms of trade and ultimately of globalisation, but remains always vulnerable because it is entirely dependent on all parties' good will. It is to the interest of industrialised countries to ensure its effectiveness and to "preach" its qualities to developing countries. Arbitration has on occasions come under fire by some countries as a "Western imposition" and there have been many incidents where courts in those countries were particularly hostile to it. It would really be regrettable if the courts of more developed countries were to introduce exceptional rules of review of arbitral awards for specific fields. A spill-over to other fields is not difficult, besides, competition law is not more special than or different from other areas of law with increased public interest elements in a specific country's domestic context.
- (c) Finally, aside from the issue of the violation or ignorance of the competition rules by an arbitration tribunal, competition law, a mainly effects-oriented law, should bother more about actual or potential anti-competitive effects on a market, produced or exacerbated by the validation, recognition or enforcement of an arbitral award. It should only be in those cases where serious anti-competitive effects might be felt in a given territory, that an arbitral award should be reviewed in its substance and possibly annulled or denied enforcement. A technical infringement of the rules only on paper, on the text of the arbitral award, should not attract attention.

On the basis of the above, it seems to us that a public policy violation and a corresponding duty of national courts to set aside or refuse to enforce an arbitral award should only ensue in cases only of a *prima facie* illegality or conflict, or in cases where the competition law issue has been totally neglected by the arbitrators with the manifest aim to evade the competition rules.

Starting from the second situation, complete disregard of EC competition law and failure to address the competition law point on the part of the arbitrators, especially when the competition law infringement is rather obvious and serious, may offend against public

¹⁵⁹⁴ See below.

policy.¹⁵⁹⁵ It may also constitute a presumption of the parties' (and the arbitrators') intention to evade the law. But in such cases, one must be careful not to reward conduct by parties who choose not to raise the competition law issue during the arbitration proceedings and prefer to wait and see whether they lose or win, in order to challenge the award.

Then, not every incompatibility between the arbitral award and the competition rules should qualify as a public policy violation. The competition law violation must be very serious, indeed repugnant, in order for an arbitral award to be refused recognition or enforcement on public policy grounds.¹⁵⁹⁶ A restriction of competition in a horizontal agreement is likely to be more detrimental for competition than a restriction in a vertical agreement.¹⁵⁹⁷ A cartel would certainly qualify as a repugnant infringement of the competition rules.¹⁵⁹⁸ Another similar distinction can be made between *per se* rules of prohibition and rule of reason competition law violations. It should be only *per se* violations that should attract attention by state courts when reviewing an arbitral award.¹⁵⁹⁹

The simply erroneous application of EC competition law by arbitrators would not qualify as a violation of *ordre public*,¹⁶⁰⁰ otherwise the most fundamental principle of the finality of arbitral awards (prohibition of the review on the merits - *révision au fond*) would be put at stake.¹⁶⁰¹ Errors of law or fact are not considered a setting-aside ground, at least in the international arbitration context,¹⁶⁰² and are not a privilege of the arbitrators. State courts make them and there is no reason to treat arbitral tribunals different than state courts. Then, it should also be borne in mind that arbitral awards are confidential in nature and are very rarely published. We wonder whether an *unpublished* award, which has been wrongly decided on competition law grounds, will have such a detrimental effect on the consistency of

¹⁵⁹⁵ See Radicati di Brozolo, *supra* (1999), p. 690.

¹⁵⁹⁶ See *idem*, pp. 688-691.

¹⁵⁹⁷ See Liebscher, *supra* (2003), p. 44.

¹⁵⁹⁸ See further *idem*, pp. 44-47.

¹⁵⁹⁹ See *Idem*, p. 47.

¹⁶⁰⁰ See Derains, "Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 338.

¹⁶⁰¹ See Hanotiau, "L'arbitrage et le droit européen de la concurrence", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997), pp. 57-58; Idot, "Panel Three Discussion: Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 288; Blaise and Idot, *supra* (2003a), p. 331; Idot, *supra* (2004b), p. 182.

¹⁶⁰² See Gaitis, "International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards", 15 *Am.Rev.Int'l Arb.* 9 (2004), pp. 65-66.

enforcement of EC competition law. Only in very exceptional cases of gross errors made by the arbitrators, should such review of the merits of the award result in non-recognition.¹⁶⁰³ In the international context, the UNCITRAL Model Law and international conventions make it far more difficult, if not impossible, for foreign arbitral awards to be reviewed in their merits by courts.¹⁶⁰⁴ The public policy exception of the New York Convention cannot also accommodate such inroads into the merits of the case, as decided by the arbitral award. Indeed, it is globally accepted that the substantive public policy can mostly cover situations of violation of human rights, rather than the violation of every conceivable substantive law that the state of enforcement deems important.¹⁶⁰⁵ Thus, this provision has been interpreted in practice in a very restrictive manner and the “unfortunate few”¹⁶⁰⁶ cases of its application have basically had to do either with cases resulting from outdated arbitration laws or with exceptional facts that truly warranted a refusal of enforcement.¹⁶⁰⁷ In many continental European countries it is accepted that only a violation of the forum’s public policy in the international sense, the so-called *ordre public international*, would be liable to lead to the non-recognition and non-enforcement of an arbitral award. Indeed, one commentator points out the following:

“Time has demonstrated ... that the public policy basis for refusing to recognize and enforce a foreign award is not only the most difficult ground to establish under Article V of the [New York] Convention but further that the exception itself is rapidly being emasculated by an evolving trend toward the application of ‘international public policy’ and a heightened deference to considerations of international comity in connection with the enforcement of foreign awards”.¹⁶⁰⁸

In sum, it seems that in all cases where the arbitrators *did apply* the EC competition rules, having fully considered the arguments of the parties and having provided a substantial

¹⁶⁰³ See Komninos, “Assistance to Arbitral Tribunals in the Application of EC Competition Law”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003), p. 371; Radicati di Brozolo, *supra* (2004), pp. 28-32, in particular, p. 29.

¹⁶⁰⁴ See Gaitis, *supra* (2004), p. 52 *et seq.*

¹⁶⁰⁵ See e.g. as to the position in Germany, Sangiovanni, “L’applicazione in Germania della convenzione di New York sul riconoscimento e l’esecuzione dei lodi arbitrali stranieri”, 41 Riv.Dir.Int.Priv.Proc. 41 (2005), p. 64.

¹⁶⁰⁶ See Van den Berg, “Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few”, in: *Arbitration in the Next Decade - Special Supplement 1999*, The ICC International Court of Arbitration Bulletin (Paris, 1999), p. 75 *et seq.*

¹⁶⁰⁷ See *idem*, pp. 85-88.

¹⁶⁰⁸ See Gaitis, *supra* (2004), p. 71. Compare the US case *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l’Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974), at 974. See also Fouchard, Gaillard, Goldman, *supra* (1999), p. 996; Liebscher, *supra* (2000), pp. 73-74; Poudret and Besson, *supra* (2002), p. 907; Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague/London/New York, 2003), p. 721.

reasoning in their award, review of the award should not be possible, even if the award erred in that application.¹⁶⁰⁹ Finally, it must always be realised that in the context of enforcement of foreign arbitral awards, where the scope of the public policy exception is quite narrow, it is only the *effects* of the recognition of an award in the territory of the forum of enforcement that matter and not the offending award's mere *existence*. Only if those effects are intolerable and would run counter to the most fundamental principles of law and morality in that jurisdiction, should there be a public policy violation.¹⁶¹⁰

ee. The Parallel of the Brussels Convention

It is noteworthy that the Court of Justice has on some occasions interpreted the concept of public policy in the context of the 1968 Brussels Convention on jurisdiction and enforcement of judgments. It has invariably followed a very restrictive interpretation because it has considered free movement of judgments as an important principle for the European integration.

Indeed, free movement of judgments has been considered instrumental for the accomplishment of the common market. It is also considered to be the cornerstone of the European area of freedom, justice and security.¹⁶¹¹ It has been termed a federating instrument¹⁶¹² and reflects more generally the "federal" principle of full faith and credit¹⁶¹³ and more specifically the country of origin principle,¹⁶¹⁴ which finds particular application in the recognition of judicial decisions Union-wide irrespective of the Member States of origin and enforcement.

The Court of Justice has held, in particular that the purpose of 293(d) EC, on the basis of which the Member States concluded the Brussels Convention, is "to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto

¹⁶⁰⁹ See Radicati di Brozolo, *supra* (2004), pp. 28-29; Idot, *supra* (2004b), p. 182, who goes as far as accepting that even an arbitral award that is manifestly contrary to EC competition law would probably not constitute a violation of public policy, as long as the EC competition issue has been raised and debated during the arbitration.

¹⁶¹⁰ See Liebscher, *supra* (2000), pp. 83-84.

¹⁶¹¹ See Art. 65 EC. See also F. Rigaux and M. Fallon, *Droit international privé* (Bruxelles, 2005), p. 433; Kohler, "Das Prinzip der gegenseitigen Anerkennung in Zivilsachen im europäischen Justizraum", 124 ZSR II 263 (2005), p. 264 *et seq.*

¹⁶¹² See Goldman, "Un traité fédérateur : La convention entre les États membres de la CEE sur la reconnaissance et l'exécution des décisions en matière civile et commerciale", 7 RTDE I (1971).

¹⁶¹³ See P. Biavati, *Europa e processo civile, Metodi e prospettive* (Torino, 2003), p. 11; Wittwer, "Die EuGH-Rechtsprechung zum Europäischen Zivilprozessrecht aus den Jahren 2003 und 2004", 13 ZEuP 868 (2005), p. 869.

¹⁶¹⁴ See Bariatti, "La futura disciplina delle obbligazioni non contrattuali nel quadro della comunitarizzazione del diritto internazionale privato", 41 Riv.Dir.Int.Priv.Proc. 5 (2005), p. 15 *et seq.*

and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States ... In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market".¹⁶¹⁵ The Court has further recognised that

"the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments".¹⁶¹⁶

With regard to the specific question of the public policy exception, Article 27(1) of that Convention provided that "a judgment shall not be recognised if such recognition is contrary to public policy in the State in which recognition is sought". The Court of Justice has consistently stressed in a series of cases that the public policy exception in that provision is meant to operate only in "exceptional cases".¹⁶¹⁷ In a judgment rendered after *Eco Swiss*,¹⁶¹⁸ the Court of Justice had to examine whether a French judgment that had allegedly violated Community law could be resisted in Italy and thus be refused recognition on public policy grounds. This case was the latest episode in a long-standing controversy surrounding protective rights in respect of an ornamental design for automobile bodywork parts.¹⁶¹⁹ Renault had sought to enforce in Italy against the Italian defendants a judgment of a French court ordering the latter to pay Renault damages for loss incurred as a result of activities found to constitute forgery. The Italian defendants alleged that the exercise of these exclusive

¹⁶¹⁵ Case C-281/02, *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" et al.*, [2005] ECR I-1383, para. 33. See the comment by Idot, (2005-5) *Europe* 29, p. 30.

¹⁶¹⁶ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, [2003] ECR I-14693, para. 72. This was a case raising very sensitive issues, since the referring Austrian court was implicitly calling into question the judicial practices of another Member State (Italy). The particular question was whether Art. 21 of the Brussels Convention (*lis pendens*) fully applied to a case, where the duration of proceedings before the courts of the Contracting State, in which the court first seized is established, is excessively long. The Court's approach was one of principle. It relied heavily upon the internal logic and the objectives of the Brussels Convention, in order to exclude any possibility of parallel proceedings in Europe. See further the balanced critique of Fentiman, 42 *CMLRev.* 241 (2005). See also case C-159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit et al.*, [2004] ECR I-3565, para. 24.

¹⁶¹⁷ *Hoffmann v. Krieg*, *op.cit.*, para. 21; case C-78/95, *Bernardus Hendrikman and Maria Feyen v. Magenta Druck & Verlag GmbH*, [1996] ECR I-4943, para. 23; case C-7/98, *Dieter Krombach v. André Bamberski*, [2000] ECR I-1935, para. 21.

¹⁶¹⁸ Case C-38/98, *Renault*, *op.cit.*

¹⁶¹⁹ See already case 53/87, *Consorzio Italiano della Componentistica di Ricambio per Autoveicoli and Maxicar v. Régie Nationale des Usines Renault SA*, [1988] ECR 6039.

rights were contrary to the free movement provisions of the EC Treaty and to Article 82 EC, therefore the judgment of the French court could not be declared enforceable in Italy because it was contrary to public policy.

That the free movement provisions of the EC Treaty and Article 82 EC pertain to the public policy notion of Article 27(1) of the Brussels Convention was explicitly stressed by Advocate General Alber in his Opinion¹⁶²⁰ and implicitly accepted by the Court.¹⁶²¹ The Court, however, made it clear that a public policy violation was to operate in very exceptional circumstances and that an alleged violation of fundamental provisions of Community law did not suffice as such.¹⁶²²

The “communitarisation” of the Brussels Convention through the adoption of Regulation 44/2001 has further reduced the scope of the public policy exception by adding an important qualification to the text of the current Article 34(1) of that Regulation: the recognition of the foreign judgment must be “manifestly” contrary to the public policy of the forum. This is indicative of the exceptional character of this provision,¹⁶²³ which has apparently led to the non-recognition/non-enforcement of judgments only in a handful of occasions in the past.¹⁶²⁴

On the basis of the above an important argument can be made that surely the function of the public policy exception in the context of arbitration must not be different from its function in the context of the enforcement of judgments. Indeed, the necessity of recognition and enforcement of arbitral awards was mentioned side-by-side in Article 293 EC with the necessity of recognition and enforcement of judgments. That there was no follow-up in the European context in the sense of a specific convention on arbitration following the example of the Brussels Convention is not due to the fact that arbitration was seen differently but, as we have mentioned above, rather to the fact that there was already a very efficient tool to ensure enforcement of arbitral awards worldwide, and thus also within the then EEC, the New York Convention. This “Treaty parameter” of arbitration must therefore not be missed. Exactly like free movement of judgments, free movement of arbitral awards within the EU

¹⁶²⁰ See paras. 66-67 and 86 of AG Alber’s Opinion.

¹⁶²¹ *Renault, op.cit.*, paras. 31-32.

¹⁶²² *Ibid.*, paras. 26 to 32 (emphasis added).

¹⁶²³ See in this regard Tagaras, “The Revision of the Brussels Convention by Regulation 44/2001”, 52 *Nomiko Vima* 1143 (2004) [in Greek], p. 1162, who stresses that this amendment of the Brussels Convention text carries only a symbolic weight, since, in any event, the European and national courts had interpreted this exception very restrictively.

¹⁶²⁴ For a German example see BGH, 16.9.93, 46 NJW 3269 (1993); for a French one see Cass.civ., 16-3-99, *Pordea v. Sté Times Newspapers Ltd.*, 126 JDI (*Clunet*) 773 (1999), [2000] ILPr. 763; for an English one see *W. Maronier v. B. Larmer* (CA), [2002] ILPr. 39.

further European integration and is extremely beneficial to the four freedoms. It should therefore be accorded the same degree of deference.

ff. The National Prodigy of *Eco Swiss*

It is interesting to note that following *Eco Swiss*, the national courts that adopted the most maximalist approach in subjecting EC competition law-related arbitral awards to a full-fledged control on public policy grounds, have proven to be Dutch. It should not be missed that the Dutch Supreme Court in its *Eco Swiss* preliminary reference had conveyed to the Court of Justice that the then applicable national competition rules would not qualify as rules of public policy, on the basis of which an arbitral award could be set aside.¹⁶²⁵ The new over-deferential approach might be due to the particular impact the *Eco Swiss* ruling had in the Dutch judicial context.

MDI represents the first judgment rendered by an EU Member State court whereby an arbitral award is not recognised and enforced on public policy grounds because of the award's violation of EC competition law. The facts of the case were that an exclusive licensing agreement was entered into by Marketing Displays International (MDI) and Van Raalte Reclame (VR) in relation to interchangeable aluminium frames for billboards. In particular, the agreement granted an exclusive licence to VR for the territory consisting of Belgium, The Netherlands, and Luxembourg. The agreement also provided for a grant-back clause with respect to improvements made by VR on technologies licensed to VR by MDI. The contract also contained an American Arbitration Association clause and a choice of the law of the State of Michigan and of the United States.

Further to a dispute as to VR's obligations to pay royalties to MDI, arbitration proceedings were initiated. VR at the outset appeared in the arbitration procedure but withdrew shortly before the rendering of the arbitral awards. The arbitration procedure led to three awards: In 2001 a "partial and interim arbitral award" found VR in breach of contract, in 2002 a "first amended partial final arbitral award" confirmed the previous ruling and enjoined VR to pay a periodic penalty payment per day of non-compliance, and in 2003 a "second amended partial final arbitral award" confirmed the previous rulings and ordered VR to pay damages to MDI. MDI petitioned a Dutch lower court to enforce the three US arbitral awards pursuant to Article 1075 of the Dutch Code of Civil Procedure and to the New York Convention. VR

¹⁶²⁵ *Eco Swiss*, *op.cit.*, para. 24.

resisted enforcement of the arbitral awards *inter alia* on public policy grounds, because in its view the exclusive agreement upheld by the awards was contrary to Article 81(1) EC due to its market-sharing elements.¹⁶²⁶ The agreement was further found ineligible to fall under the then applicable block exemption Regulation 240/1996 on technology transfers, because of the grant-back clause which the Regulation did not allow. There was also no possibility of individual exemption because the agreement was never notified to the Commission.

On appeal, the Court of Appeal of The Hague referred to *Eco Swiss* and considered that Article 1 of the agreement was *prima facie* anti-competitive, because it awarded VR an exclusive licence to manufacture and sell products in the countries of the Benelux. It also noted that the 2001 award found VR in breach of contract because the latter was offering products protected by MDI patents outside its exclusivity territory. The Court then referred to the block exemption Regulations applicable at the relevant time and noted that they all disapproved of grant-back clauses. These were, in the Court's words, "intolerable restrictions". In these circumstances, the Dutch court considered that the enforcement of the three US arbitral awards should be denied pursuant to Article V(2)(b) of the New York Convention.¹⁶²⁷

On the entirely opposite side, following the minimalist approach, lies a recent judgment of the Paris Court of Appeal, a court particularly experienced both in competition law and arbitration.¹⁶²⁸ In *Thalès* the Paris Court of Appeal accepted that, while EC competition law is a matter of public policy, the violation of public policy in an international arbitration case must be "flagrant, effective and concrete", in order to lead to the setting aside of an arbitral award.¹⁶²⁹ In this case, an arbitral award awarded damages to Euromissile on the basis of a licensing agreement, which stipulated that Euromissile would hold for twenty years the exclusive right to produce and sell a missile in Europe. A dispute arose when Thalès decided to proceed itself to the production of the missile, through a subsidiary. Euromissile brought the dispute before an ICC arbitration tribunal, which rendered a partial award in 2000 and a final one in 2002. The arbitrators awarded € 108 million to Euromissile and Thalès applied to the Paris Court of Appeal to set the award aside, because the licensing agreement was

¹⁶²⁶ Pres. Rechtbank The Hague, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, 27-5-04, KG/RK 2002-979 and 2002-1617, in: http://europa.eu.int/comm/competition/antitrust/national_courts.

¹⁶²⁷ Court of Appeal of The Hague, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, Case No. 04/694 and 04/695, in: http://europa.eu.int/comm/competition/antitrust/national_courts.

¹⁶²⁸ The Paris Court of Appeal is the competent court to hear appeals against the *Conseil de la concurrence* and at the same time it hears numerous setting aside actions against arbitral awards rendered in Paris, seat of the ICC and international arbitration site.

¹⁶²⁹ CA Paris, 18-11-04, *Thalès v. Euromissile*, (2005) Rev.Arb. 750.

allegedly incompatible with the EC competition rules and thus null and void. In particular, Thalès's competition argument was based on the allegedly excessive duration of the exclusivity arrangement and on the market-sharing elements therein.¹⁶³⁰

The competition law question had not been raised by any of the parties (or the arbitrators themselves) during the arbitration proceedings, and it was only at the review stage that Thalès relied upon it to make the public policy argument. The parties had expert legal advice throughout the arbitration proceedings and the arbitrators were experienced, yet the competition issue never arose. The Court of Appeal noted this rather inconsistent behaviour of the plaintiff (*venire contra factum proprium*) and was not impressed by the EC competition law point. Although it did accept that the competition law arguments were not totally frivolous, it held that they required a detailed examination of the substance, for which the court and the setting aside procedure were ill-suited, otherwise this would mean reviewing the merits of the case (*révision au fond*), which French law, like most modern arbitration laws, do not allow for. It is evident from the judgment that the court considered the competition law argument not totally frivolous but, at the same time, not "eye-catching" enough to substantiate a violation of public policy. The infringement of the competition rules had to be "manifest" for the setting aside action to be successful.

Of the two national judgments, in our view, the most disappointing one is the Dutch judgment. It constitutes a dangerous precedent in Europe because it creates an exception to the cardinal rule of finality of arbitral awards and prejudices the effectiveness of the New York Convention. It shows also the excesses of the maximalist approach, which must be rejected particularly in cases such as the one at issue where the agreement merely contained a clause disapproved by a block exemption Regulation. Such a failure cannot suffice to qualify as a violation of Article 81(1) EC¹⁶³¹ and certainly as a public policy violation. It should take much more than a mere failure to fall into the ambit of a block exemption and to notify an agreement to an antitrust authority to lead a court to the dramatic option to refuse to recognise a foreign arbitral award. Besides, state courts must draw the appropriate conclusions from

¹⁶³⁰ It should be mentioned that under EC competition law such a horizontal technology transfer agreement would have to be examined in its economic and legal context, in order to conclude whether it has an object or effect to restrict competition. Then, it must be ascertained whether it benefits from a block exemption regulation, and finally whether, notwithstanding its restrictive character, it has countervailing economic qualities that make it lawful.

¹⁶³¹ Under the system of enforcement established by Reg. 1/2003, an agreement that cannot fall under a block exemption regulation is not automatically anti-competitive but must be analysed under Art. 81(3) EC. It appears that the Dutch court did not consider this, perhaps because it thought that the agreement was not temporally covered by the legal exception system and probably had not been notified to the European Commission. On the temporal problem see *supra*. In any event such formalism must be rejected.

situations where parties elect not to raise the competition law point during the arbitration proceedings but only at the belated stage of judicial review.

The French judgment, on the other hand, is an arbitration-friendly application of the *Eco Swiss* principles and deserves to be approved. Although the reasoning may not at times be perfect,¹⁶³² the policy behind this judgment is very sound. The conclusion to draw from that case is that the arbitrators' failure to apply EC competition law will lead to the annulment or non-recognition/non-enforcement of the arbitral award on public policy grounds only in exceptional cases of manifest hard core restrictions of competition. This would be the case when the arbitrators uphold a price-fixing or market-sharing cartel, thus essentially being the executive organs thereof, or when they adjudicate upon a dispute over the execution of an illegal bid-rigging arrangement. The fact also that the plaintiff in this case, a multinational company with access to excellent legal representation and resources, chose not to raise the competition law question before the arbitration tribunal but rather to await the result of the arbitration and, if unfavourable to it, then to raise it in a setting aside proceeding, is indicative of the problems that would be created for arbitration in general if the maximalist approach were to be adopted.

gg. Arbitrators' "Duty" to Apply EC Competition Law

The Court of Justice's most ingenious ruling (or non-ruling) in *Eco Swiss* has to do with the referring court's question concerning the arbitrators' duty to apply Community competition law even *ex officio*, when no party raises it in the arbitral proceedings. The Court after having asserted in a powerful way the public policy nature of the Treaty competition rules and the duties of national courts to set aside on such grounds an arbitral award that violates Article 81 EC, contrary to its Advocate General, who had concluded that arbitrators are not bound by Article 10 EC and are not under a duty to apply EC competition law *ex officio*, opted not to answer to that particular question, but to refer to its answer on the other issues.¹⁶³³

Indeed, arbitral tribunals are not considered as judicial organs of the Member States and are, therefore, not subject to any of the duties resulting from Article 10 EC. Thus, they are not directly bound by this provision, as national courts would be under certain circumstances, to

¹⁶³² For example, the court finds that to annul the award for not having raised the competition law issue and for having enforced an anti-competitive agreement would amount to *révision au fond*. This is incorrect in this case because competition law had not been applied at all by the arbitrators. We would speak of *révision* only in case the arbitration tribunal had *applied* EC competition law erroneously.

¹⁶³³ *Eco Swiss*, *supra* 45, para. 42.

apply EC competition law *ex officio*.¹⁶³⁴ However, one may reach a similar result in an indirect way. A fundamental concern of the arbitrators is to render an award that will be enforceable.¹⁶³⁵ In the most extreme cases, if the arbitrators' award is *prima facie* non-enforceable because of a manifest violation of EC competition law, it should not be excluded that the very performance of the contractual duties of the arbitrators as against the parties might be considered as failed and the former may even have to return their fees.¹⁶³⁶ In international commercial arbitration regard should also be given to Article 35 of the 1998 ICC Rules of Arbitration, according to which "the Arbitral Tribunal ... shall make every effort to make sure that the Award is enforceable at law".¹⁶³⁷ The efficiency of arbitration as an institution would be compromised, if arbitrators were to render awards that would be liable to non-enforcement or annulment, because of their incompatibility with mandatory legal provisions, whose infringement surely constitutes a public policy violation. As a former Secretary-General of the ICC Court of Arbitration stresses, referring to that problem in international commercial arbitration, "an international arbitrator is bound as regards the 'Societas Mercatorum' to ensure that arbitration does not become an instrument for fraud upon the legitimate interests of the State. If he neglects that duty, international arbitration will disappear, at the expense of the development of international trade".¹⁶³⁸

Therefore, it is recognised that "in reality, the attitude and action of an arbitrator faced with an EC antitrust issue should be influenced by pragmatism rather than principle".¹⁶³⁹ Particularly in cases where an infringement of EC competition law seems certain¹⁶⁴⁰ and where an EU Member State is a likely forum for the enforcement of the award, the arbitrators

¹⁶³⁴ See Temple Lang, "Panel Discussion: International Arbitration", in: Hawk (Ed.), *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute* (New York/The Hague, 1995), p. 419.

¹⁶³⁵ See Idot, *supra* (1996), p. 570.

¹⁶³⁶ See Burrichter, "Panel Three Discussion: Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 481.

¹⁶³⁷ See the opinion of an former Secretary-General of the ICC International Court of Arbitration: Schwartz, "The Domain of Arbitration and Issues of Arbitrability: The View from the ICC", 9 ICSID Rev. 17 (1994), p. 23, according to whom this Article entails that arbitrators may, if necessary, invoke of their own motion mandatory rules of law that may have an impact on the validity of the transaction that is the subject of arbitration.

¹⁶³⁸ See Derains, "Report", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993), p. 267. See also the *Report Adopted by the Working Party on Arbitration and Competition and Approved by the Executive Board of the ICC on 4-4-84*, in: (1984) Rev.Suisse Dr.Int.Conc., n° 21, 37, which stresses that "the arbitrators must avoid any decision incompatible with public policy if they wish to ensure the effectiveness of the arbitration. If they consider that they have jurisdiction, they should apply the rules of public policy. And it must be stressed that even when they are 'amiable compositeurs' they have to respect the rules of public policy" (p. 38).

¹⁶³⁹ See Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction", in: Lew (Ed.), *Contemporary Problems in International Arbitration* (London, 1986), p. 80.

¹⁶⁴⁰ On this question, see above.

are expected to apply the competition provisions of the Treaty, even if the parties have not raised such issues, and, as judges of the contract, they can draw the relevant consequences as a result of this illegality and nullity of the anti-competitive arrangement.¹⁶⁴¹ The same holds true even if the parties have opted for a non-EU Member State law as *lex causae* and regardless of the arbitral tribunal's EU or extra-EU seat.¹⁶⁴²

The Court's preference not to assign in a direct way a duty to arbitrators to apply Community competition law, but rather to point to them towards this direction in an indirect way, i.e., via national courts, is to be approved. In other words, the rules of the game are that EU courts would strike down or refuse to recognise arbitral awards that manifestly violate EC competition law. The arbitrators are called by the Court to be aware of this possibility and accordingly to exercise utmost caution so that they do not offend against the most significant principles of Community competition law. At the same time, this approach has as consequence that if the arbitrators, having these realities in mind, were indeed to take EC competition law into account *ex officio*, their award would not be liable to annulment on *ultra petita* grounds, because their decision to raise of their own motion the competition law question would be guided by the public policy nature of Community competition law and the concern to ensure compliance with that law and therefore to secure the award's enforcement. Indeed, it can be submitted that a national court would be precluded by the principle of effectiveness of EC law in such a situation from annulling a respectful to the EC antitrust rules arbitral award on *ultra petita* grounds.

Finally, it is important to stress that if one can speak of an indirect "duty" imposed upon arbitrators, this is certainly to give reasons and explain why they have applied EC competition law to the facts before them in the way they did. By doing so, arbitrators reduce the risk of annulment or of refusal of recognition or enforcement, while the state court is facilitated in its review of the circumstances and possibly in its public policy control. Interestingly, a duty to give reasons in cases affecting Community law rights is also a general

¹⁶⁴¹ See Grossen, "Arbitrage et droit de la concurrence", in: Reymond & Bucher (Eds.), *Recueil de travaux suisses sur l'arbitrage international* (Zürich, 1984), p. 42.

¹⁶⁴² See e.g. the ICC arbitral award in case n° 8626/1996, published in: 126 JDI (*Clunet*) 1073 (1999), which was decided pre-*Eco Swiss*. An arbitral tribunal sitting in Switzerland, notwithstanding the parties' selection of New York law to govern the substance of the dispute, proceeded to apply (though in that case not *ex officio*) Art. 81 EC and the then block exemption Regulation on know-how licensing agreements (Reg. 556/89) and considered illegal a non-competition clause in the main contract. The tribunal recognised that this might not have been the case under New York law, but nevertheless opted to apply the EC competition provisions to that specific issue in view of the effect that the anti-competitive clause had on EU Member States. The tribunal made particular reference to the then Art. 26 of the *ICC Rules of Conciliation and Arbitration of 1988*, (now Art. 35 of the *ICC Rules of Arbitration of 1998*).

duty imposed by Community law upon national courts and administrative authorities.¹⁶⁴³ Particularly with regard to administrative authorities, a full-fledged duty to give reasons ensures an adequate review by judicial organs, which are the only capable of submitting a preliminary reference to the Court of Justice under Article 234 EC. It is in fact accepted that the above consideration may mean that national administrative authorities are subject to a stricter judicial review standard in the Community law sphere than in the national law sphere.¹⁶⁴⁴

Of course, such a “hard” duty cannot extend to arbitral tribunals, since Article 10 EC is here inapplicable, but certainly gives a feeling as to the importance of reasoning and to its link with effective judicial protection of Community law-based rights and with the effectiveness of Community law. An adequate reasoning in an arbitral award means that the exigency of increased judicial review at the setting aside or recognition/enforcement stage recedes.

hh. Conclusion

The possibility of an arbitral award’s being set aside or being refused recognition and enforcement in case of violation of *ordre public* is by far the best corrective mechanism in the application of EC competition norms by arbitrators. The mere deterrent effect of this possibility is such that it ensures in the best way that due respect will be paid to those norms. It also fits well with the nature of arbitration and it does not endanger its flexibility and informality. Arbitrators are still the “masters of the arbitral proceedings”. The difference is that they have the responsibility or the burden to exercise this discretion in an appropriate way, so as to render an enforceable award.

This means that the most serious gaps in the enforcement of EC competition law are remedied. While arbitration cannot be elevated, contrary to some expectations, to a forum of *stricto sensu* private antitrust enforcement, since it is merely and foremost a method of resolution of commercial disputes, the public policy nature of the EC competition rules indirectly safeguards the effectiveness of those rules and thus transforms arbitration to a useful ally in the overall enforcement of competition law and to the creation of a true competition culture.

¹⁶⁴³ See e.g. case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens et al.*, [1987] ECR 4097, para. 15; case C-104/91, *Colegio Oficial de Agentes de la Propiedad Inmobiliaria v. José Luis Aguirre Borrell et al.*, [1992] ECR I-3003, para. 15.

¹⁶⁴⁴ See Temple Lang, *supra* (1998), p. 123.

Bibliography

- Abdelgawad Walid**, *Arbitrage et droit de la concurrence, Contribution à l'étude des rapports entre ordre spontané et ordre organisé*, (Paris, 2001).
- Abdelgawad Walid**, "L'arbitrage international et le nouveau règlement d'application des articles 81 et 82 CE", (2004) *Rev.Arb.* 253.
- Albors-Llorens Albertina**, "*Courage v. Crehan: Judicial Activism or Consistent Approach?*", 61 *CLJ* 38 (2002).
- Albors-Llorens Albertina**, *EC Competition Law and Policy* (Cullompton/Portland, 2002).
- Alexiadis Peter and Sullivan Peter**, "Vertical Restraints: New Directions in EU Policy", in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003).
- Amory Bernard and Marchini Càmia Francesca**, "La demande de 'clémence' auprès de la Commission Européenne : Effets collatéraux dans d'autres juridictions", Sept. 2005, Vol. II, *e-Competitions*, in: <http://www.concurrences.fr>.
- Anagnostopoulou Despoina and Kleftodimou Evangelia**, *Know-how Licensing Contracts in Community Law* (Athens/Komotini, 1992) [in Greek].
- Anagnostopoulou-Yiannakou Despoina**, "The National Judge as a Factor of the Community Justice", 51 *Nomiko Vima* 1800 (2003) = in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in Greek].
- Anderson W.K. David**, "Damages for Breach of Competition Rules", in: Andenas & Jacobs (Eds.), *European Community Law in the English Courts* (Oxford, 1998).
- Antonioli Deflorian Luisa**, "Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law – A Uniform Law?", 2(2) *Global Jurist Frontiers*, Article 4 (2002).
- Appeldoorn F. Jochen**, "Are the Proposed Changes Compatible with Article 81(3) EC?", 22 *ECLR* 400 (2001).
- Arhel Pierre**, "Modernisation des règles relatives aux ententes et abus de position dominante", *Petites Affiches*, 4-12-2000, No. 241, 7.
- Arhel Pierre**, "Modernisation des règles communautaires relatives à la mise en œuvre de l'interdiction des ententes et abus de position dominante (publication du nouveau règlement)", *Petites Affiches*, 2-4-2003, No. 66, 6.
- Ariño Mónica**, "Digital War and Peace: Regulation and Competition in European Digital Broadcasting", 10 *EPL* 135 (2004).
- Arnall Anthony**, "References to the European Court", 15 *ELRev.* 375 (1990).
- Arnall Anthony**, *The European Union and its Court of Justice* (Oxford, 1999).
- Auletta Ferruccio**, "Le questioni incidentali", in: Verde (Ed.), *Diritto dell'arbitrato rituale* (Torino, 1997).
- Auteri Paolo**, "Il dibattito su una autorità antitrust europea", 2 *Contr. & Impr. (Eur.)* 518 (1997).
- Ball Markham**, "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration", 22 *Arb.Int'l* 73 (2006).
- Baquero Cruz Julio**, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (Oxford/Portland, 2002).
- Barceló J. James III**, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", 36 *Vand.JTransnat'l* 1115 (2003).
- Bariatti Stefania**, "La futura disciplina delle obbligazioni non contrattuali nel quadro della comunitarizzazione del diritto internazionale privato", 41 *Riv.Dir.Int.Priv.Proc.* 5 (2005).
- Baron Michael**, "Die Rechtsnatur der Gruppenfreistellungsverordnungen im System der Legalausnahme – ein Scheinproblem", 56 *WuW* 358 (2006).

- Bartels Wolfgang**, "Kooperation zwischen EU-Kommission und nationalen Gerichten im europäischen Wettbewerbsverfahren: Einige Anmerkungen zum *Masterfoods*-Urteil des EuGH", 43 ZfRV 83 (2002).
- Bartosch Andreas**, "Von der Freistellung zur Legalausnahme: Was geschieht mit der Rechtssicherheit?", 50 WuW 462 (2000).
- Bartosch Andreas**, "Von der Freistellung zur Legalausnahme: Der Vorschlag der EG-Kommission für eine 'neue Verordnung Nr. 17'", 12 EuZW 101 (2001).
- Basedow Jürgen**, "Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft", in: Due, Lutter & Schwarze (Eds.), *Festschrift für Ulrich Everling*, Vol. I (Baden-Baden, 1995).
- Basedow Jürgen**, "Rechtssicherheit im europäischen Wirtschaftsrecht - Ein allgemeiner Rechtsgrundsatz im Lichte der wettbewerbsrechtlichen Rechtsprechung", 4 ZEuP 570 (1996).
- Basedow Jürgen**, "The Renaissance of Uniform Law: European Contract Law and its Components", 18 LS 121 (1998).
- Basedow Jürgen**, "Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation", in: Einhorn (Ed.), *Liber Amicorum E.J. Mestmäcker*, 2 EBOR 443 (2001).
- Basedow Jürgen**, "Gemeinschaftsrechtliche Grenzen der Ministererlaubnis in der Fusionskontrolle: Zum Verhältnis des § 42 GWB zu den Art. 81 und 82 EG", 14 EuZW 44 (2003).
- Basedow Jürgen**, "Grundlagen des europäischen Privatrechts", 44 JuS 89 (2004).
- Bastianon Stefano**, "Il risarcimento del danno per violazione del diritto antitrust in Inghilterra e in Italia", 3 *Danno e Responsabilità* 1066 (1998).
- Baudenbacher Carl and Schnyder K. Anton**, *Die Bedeutung des EG-Kartellrechts für Schweizer Schiedsgerichte* (Basel/Frankfurt a.M., 1996).
- Baudenbacher Carl**, "Enforcement of EC and EEA Competition Rules by Arbitration Tribunals Inside and Outside the EU", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Baur F. Jürgen**, "Schadensersatz und Unterlassungsansprüche bei Verstößen gegen die Kartellrechtsvorschriften des EWG-Vertrags", 23 EuR 257 (1988).
- Bavasso F. Antonio**, "Electronic Communications: A New Paradigm for European Regulation", 41 CMLRev. 87 (2004).
- Bayreuther Frank**, "Die Reform der EG-Wettbewerbspolitik gegenüber vertikalen Wettbewerbsbeschränkungen", 11 EWS 106 (2000).
- Beater Axel**, "Kartellverbot und Vergleichsvereinbarung", 50 WuW 584 (2000).
- Beatson Jack and Schrage Eltjo**, *Casebooks on the Common Law of Europe, Unjustified Enrichment* (Oxford/Portland, 2003).
- Bebr Gerhard**, "Arbitration Tribunals and Article 177 of the EEC Treaty", 22 CMLRev. 489 (1985).
- Becher F. Klaus**, "Reform des Wettbewerbsrechts aus der Sicht der Industrie", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001).
- Bechtold Rainer**, "Antitrust Law in the European Community and Germany: An Uncoordinated Co-existence?", in: Hawk (Ed.), *International Antitrust Law and Policy 1992, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1993).
- Bechtold Rainer**, "Modernisierung des EG-Wettbewerbsrechts: Der Verordnungs-Entwurf der Kommission zur Umsetzung des Weißbuchs", 55 BB 2425 (2000).
- Bechtold Rainer**, "EG-Gruppenfreistellungsverordnungen: Eine Zwischenbilanz", 12 EWS 49 (2001).

- Bechtold Rainer**, "Maßstäbe der 'Selbstveranlagung' nach Art. 81 Abs. 3 EG", Kommentar, 53(4) WuW (2003).
- Behrens Peter**, "Comments on *Josef Drexl: Choosing between Supranational and International Law Principles of Enforcement*", in: Drexl (Ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law* (Berne/The Hague/London/New York, 2003).
- Behrens Peter**, "Das wirtschaftsverfassungsrechtliche Profil des Konventsentwurfs eines Vertrages über eine Verfassung für Europa", in: Fuchs, Schwintowski & Zinner (Eds.), *Wirtschafts- und Privatrecht, Im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung, Festschrift für Ulrich Immenga zum 70. Geburtstag* (München, 2004).
- Bellamy Christopher**, "The Modernisation of EC Antitrust Policy - Some Reflections: Don't Throw the Baby out with the Bath Water", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Bellis Jean-François**, "Le 'Livre blanc' sur la modernisation des règles d'application des articles 81 et 82 du Traité CE : Un pas décisif vers le démantèlement d'un particularisme européen", 8 JdT (Eur.) 129 (2000).
- Bellis Jean-François**, "Les défis de la modernisation du droit européen de la concurrence", 11 JdT (Eur.) 73 (2003).
- Benedettelli V. Massimo**, "Ulteriori riflessioni sull'ambito di applicazione della Legge n. 287/1990 (Risposta a Marino Bin)", 8 Contr. & Impr. 587 (1992).
- Beneyto José María**, "Transforming Competition Law through Subsidiarity?", V(1) *Collected Courses of the Academy of European Law* 267 (1994).
- Bergé Jean-Sylvestre and Sinopoli Laurence**, "Droit des obligations et autonomie procédurale : La distinction fond/procédure sous le double éclairage du droit communautaire et du droit des États membres", *Petites Affiches*, 24-8-2004, No. 169, 7.
- Berger Klaus Peter**, "The Modern Trend towards Exclusion of Recourse against Transnational Arbitral Awards: A European Perspective", 12 *Fordham Int'l LJ* 605 (1988-89).
- Berger Klaus Peter**, *International Economic Arbitration, Studies in Transnational Economic Law*, Vol. IX (Deventer/Boston, 1993).
- Berger Klaus Peter**, *The Creeping Codification of the Lex Mercatoria* (The Hague/London/Boston, 1999).
- Berger Klaus Peter**, "Das neue Schiedsverfahrensrecht in der Praxis: Analyse und aktuelle Entwicklungen", 47 RIW 7 (2001).
- Bergeron H. James**, "Antitrust Federalism in the European Union after the Modernization Initiative", 46 *Antitrust Bull.* 513 (2001).
- Berlinguer Aldo**, *Professione forense, impresa e concorrenza, Tendenze e itinerari nella circolazione di un modello* (Milano, 2003).
- Bernini Giorgio**, "Jurisdictional Issues: EEC Merger Regulation - Member State Laws and Articles 85-86", in: Hawk (Ed.), *International Mergers and Joint Ventures 1990, Annual Proceedings of the Fordham Corporate Law Institute* (New York/ London, 1991).
- Betlem Gerrit**, "Environmental Liability and Private Enforcement - Lessons from International Law, the European Court of Justice, and European Mining Laws", 4 *YEEL* 117 (2004).
- Betto Jean-Georges, Fry Jason, Henry Marc, Kleiman Elie and Pinsolle Philippe**, "Nouvelles tendances de l'arbitrage international", (2006) *RDAl/IBLJ* 371.
- Biavati Paolo**, *Europa e processo civile, Metodi e prospettive* (Torino, 2003).
- Biering Peter**, "The Application of EU Law in Denmark: 1986 to 2000", 37 *CMLRev.* 925 (2000).
- Birk Axel**, "Belieferungsansprüche bei Verstoß gegen Art. 81 EG?", 11 *EWS* 485 (2000).

- Birk Axel**, "Die Konkurrentenklage im EG-Wettbewerbsrecht", 14 EWS 159 (2003).
- Bishop Simon**, "Modernisation of the Rules Implementing Articles 81 and 82", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Blaise Jean-Bernard and Idot Laurence**, "Chronique concurrence (année 1999)", 36 RTDE 741 (2000).
- Blaise Jean-Bernard and Idot Laurence**, "Chronique concurrence (années 2000 et 2001)", 38 RTDE 103 + 339 + 555 (2002).
- Blaise Jean-Bertrand and Idot Laurence**, "Chronique concurrence (1er janvier 2002 - 31 mars 2003) : Règlement 1400/2002 du 31 juillet 2002", 39 RTDE 699 (2003).
- Blaise Jean-Bertrand and Idot Laurence**, "Chronique concurrence (1er janvier 2002 - 31 mars 2003) : Règlement 1/2003 du 16 décembre 2002", 39 RTDE 287 (2003).
- Blake Stephen and Schnichels Dominik**, "Leniency Following Modernisation: Safeguarding Europe's Leniency Programmes", (2004-2) *EC Competition Policy Newsletter* 7.
- Blanke Gordon**, *The Use and Utility of International Arbitration in EC Commission Merger Remedies, A Novel Supranational Paradigm in the Making?* (Groningen, 2006).
- Blessing Marc**, "Introduction to Arbitration - Swiss and International Perspectives", in: Berti, Honsell et al. (Eds.), *International Arbitration in Switzerland, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Basel/The Hague/London/Boston, 2000).
- Blessing Marc**, *EG/US Kartellrecht in internationalen Schiedsverfahren - 77 Aktuelle Fragen aus der Praxis* (Basel, 2002).
- Blessing Marc**, *Arbitrating Antitrust and Merger Control Issues* (Basle/Geneva/Munich, 2003).
- Bloom Margaret**, "The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy", 1 *Competition Policy International* 55 (2005).
- Böge Ulf**, "Stellungnahme zur Reform der europäischen Wettbewerbsregeln zur Anhörung des Ausschusses für Wirtschaft und Währung des Europäischen Parlaments am 27. Februar 2001", *Unpublished Paper* (27-2-01).
- Böge Ulf**, "Die Erste Seite: Europäisches Kartellrecht: Modernisierung ja, aber nicht um jeden Preis", 12(4) EWS (2001).
- Böge Ulf**, "The Discussion on the Modernisation of EC Antitrust Policy: An Update on the Bundeskartellamt's Point of View", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Böge Ulf**, "Das Netzwerk der EU-Wettbewerbsbehörden nimmt Gestalt an: Anforderungen an das Bundeskartellamt und Änderungsbedarf im deutschen Kartellrecht", 14 EWS 441 (2003).
- Böge Ulf and Ost Konrad**, "Up and Running, or Is it? Private Enforcement – The Situation in Germany and Policy Perspectives", 27 ECLR 197 (2006).
- Boqvist Pär**, "Exécution des sentences arbitrales en Suède", (1991) RDAI/IBLJ 1145.
- Bos V.F. Pierre and Struijlaart A. Robin**, "The Netherlands", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003).
- Boskovits Kosmas**, *The European Union from the Viewpoint of International Law, Specificity and Extent of Autonomy of the Law of European Integration* (Athens/Komotini, 2000) [in Greek].
- Bouchayar Konstantinos**, "Recovery of Illegally Levied Indirect Taxes that Have Been Passed on the Consumers under the New Case Law of the ECJ", 10 *Dikaio Epicheiriseon kai Etairion* 519 (2004) [in Greek].

- Boulanger Fabienne**, "Frankreich", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. IV, *France* (Baden-Baden, 1997).
- Bourgeois H.J. Jacques and Langeheine Bernd**, "Jurisdictional Issues: EEC Merger Regulation - Member State Laws and Articles 85-86", in: Hawk (Ed.), *International Mergers and Joint Ventures 1990, Annual Proceedings of the Fordham Corporate Law Institute* (New York/London, 1991).
- Bourgeois H.J. Jacques**, "EC Competition Law and Member State Courts", in: Hawk (Ed.), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1994).
- Bourgeois H.J. Jacques**, "Enforcement of EC Competition Law by National Authorities: Square Pegs in Round Holes", in Gormley (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997).
- Bourgeois H.J. Jacques**, "Decentralised Enforcement of EC Competition Rules by National Competition Authorities: Some Remarks on Consistency, Coherence and Forum Shopping", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Bourgeois H.J. Jacques and Humpe Christophe**, "The Commission's Draft 'New Regulation 17'", 23 ECLR 43 (2002).
- Bovis Christopher**, "Transforming the Application of EC Competition Laws: The Case of Decentralisation", 12 EBLR 98 (2001).
- Braakman J. August**, "The Application of the Modernised Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Braun Ellen**, "Deutschland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. III, *Germany* (Baden-Baden, 1996).
- Braun Ellen and Bader Christine**, "German Competition Law: Overview and Recent Developments", in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003).
- Brealey Mark**, "Adopt *Perma Life*, but Follow *Hanover Shoe* to *Illinois*? Who Can Sue for Damages for Breach of EC Competition Law", 1 Comp.LJ 127 (2002).
- Briand-Mélédo Danièle**, "Droit de la concurrence, droit constitutionnel substantiel de la communauté européenne", 57 RTDComm. 205 (2004).
- Brinker Ingo**, *Mißbrauchsaufsicht auf der Grundlage der Gruppenfreistellungsverordnungen, Die Bedeutung des Widerrufsrechts der EG-Kommission im Rahmen der Gruppenfreistellungsverordnungen nach Artikel 85 Absatz 3 EG-Vertrag*, Dissertation, Ludwig-Maximilians-Universität München (München, 1994).
- Brinker Ingo**, "Rapport Allemand", in: *XVIII congrès FIDE* (Stockholm, 3-6 juin 1998), Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).
- Broomhall David and Goyder Joanna**, "European Union", in: *Modernisation in Europe 2005, Global Competition Review Special Report* (London, 2005).
- Brown Adrian**, "Notification of Agreements to the EC Commission: Whether to Submit to a Flawed System", 17 ELRev. 323 (1992).
- Bruzzo Ginevra and Saija Aurora**, "Modernizzazione dei regolamenti di esenzione: I confini rispetto alla regolazione settoriale", 8 Contr. & Impr. (Eur.) 108 (2003).
- Bühring-Uhle Christian**, *Arbitration and Mediation in International Business, Designing Procedures for Effective Conflict Management* (The Hague/London/Boston, 1996).
- Burnside Alec and Botteman Yves**, "Networking amongst Competition Authorities", 10 Int.TLR 1 (2004).

- Burnside Alec and Crossley Helen, "Co-operative Mechanisms within the EU: A Blueprint for Future Co-operation at the International Level", 10 *Int.TLR* 25 (2004).
- Burrichter Jochen, "The Application of Article 81(3) by National Courts: Some Remarks from the Point of View of a Practitioner", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Callies Christian, "Europa als Wertgemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?", 59 *JZ* 1033 (2004).
- Calvani Terry, "Competition Penalties and Damages in a Cartel Context: Criminalisation and the Case for Custodial Sentences", Paper Presented in the Conference Organised by the Amsterdam Center for Law and Economics on Remedies and Sanctions in Competition Policy (Amsterdam, 17-18 February 2005).
- Calvo Caravaca Alfonso Luis and Canedo Arrillaga María Pilar, "Libre competencia y descentralización", 2(1) *Rev.Esp.Der.Eur.* 5 (2003).
- Canenbley Cornelis, "Decentralisation of Enforcement of Community Law - Working Paper IV", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997).
- Canivet Guy, "Aspects stratégiques du procès en droit de la concurrence", in: *Les aspects contemporains du droit de la distribution et de la concurrence, Actes du colloque de l'université de Toulouse I (24 et 25 mars 1995) et conférences de doctorat* (Paris, 1996).
- Canivet Guy and Huglo Jean-Guy, "L'Obligation pour le Juge Judiciaire National d'Appliquer d'Office le Droit Communautaire au Regard des Arrêts *Jeroen Van Schijndel* et *Peterbroek*", (1996-4) *Europe* 1.
- Canivet Guy, "The Responsibility of the Judiciary in the Implementation of Competition Policy", in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD (Paris, 1997).
- Canivet Guy, "Concurrence : Entre droit et politique", *Les Annonces de la Seine*, 13-6-2002, No. 36, 1.
- Canivet Guy, "Les réseaux de juges au sein de l'Union européenne : Raisons, nécessités et réalisations", in: Idot & Poillot-Peruzzetto (Eds.), *Internormativité et réseaux d'autorités, L'ordre communautaire et les nouvelles formes de relations* (Toulouse, 24 Octobre 2003), *Petites Affiches*, 5-10-2004, No. 199, 45.
- Capelli Fausto, "La riforma della disciplina comunitaria della concorrenza e i nuovi compiti affidati ai giudici nazionali (con particolare riferimento alla situazione italiana)", 39 *Dir.Com.* 395 (2000).
- Carbone M. Sergio and Munari Francesco, "Commissione europea o autorità indipendente per l'applicazione delle norme comunitarie antitrust?", 2 *Contr. & Impr. (Eur.)* 533 (1997).
- Carbonneau E. Thomas, "The Exercise of Contract Freedom in the Making of Arbitration Agreements", 36 *Vand.JTransnat'l* 1189 (2003).
- Carpi Federico, "Les rapports entre l'arbitrage et le juge ordinaire", 2 *ZZPInt.* 397 (1997).
- Caspar Ute, *Wettbewerbliche Gesamtwürdigung von Vereinbarungen im Rahmen von Art. 81 Abs. 1 EGV* (Köln/Berlin/Bonn/München, 2001).
- Castronovo Carlo, "Antitrust e abuso di responsabilità civile", 10 *Danno e Responsabilità* 469 (2004).
- Castronovo Carlo, "Responsabilità civile antitrust: Balocchi e profumi", 10 *Danno e Responsabilità* 1165 (2004).
- Catalano Nicola, "Rapports entre les règles de concurrence établies par le Traité CEE et les législations des États membres", 15 *RIDC* 269 (1963).
- Cederschiöld Charlotte, "Efficient Protection of Competition in an Enlarged Community through Full Association of National Competition Authorities and National Courts", in:

- Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_cederschiold.pdf.
- Celli Riccardo**, "Modernisation of Competition Rules in the EU: What Will Change in Practice?", Paper Presented at the Sixth Annual IBA Competition Conference (Fiesole, 20 September 2002).
- Cherednychenko Olha**, "EU Fundamental Rights, EC Fundamental Freedoms and Private Law", 14 ERPL 23 (2006).
- Chevalier Philippe**, "Clauses suspectes dans un accord de règlement à l'amiable", 3(1) *EC Competition Policy Newsletter* 8 (1997).
- Chiti P. Mario**, "L'organismo di diritto pubblico e la nozione comunitaria di pubblica amministrazione", in: *Annuario 1999-2000 dell'associazione italiana dei professori di diritto amministrativo* (Milano, 2001).
- Chiti P. Mario**, *Diritto amministrativo europeo* (Milano, 2004).
- Christianos A. Vassileios**, *Overruling of Prior Judgments in the Case Law of the Court of Justice of the European Communities* (Athens/Komotini, 1998) [in Greek].
- Christianos A. Vassileios**, *Dynamics in the Relations between Judiciary and Legislature in the European Community* (Athens/Komotini, 2005) [in Greek].
- Chukwumerije Okezie**, "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996", 15 *Arb.Int'l* 171 (1999).
- Cienfuegos Mateo Manuel**, "L'application de la nullité de l'article 85§2, du Traité CEE par les juridictions nationales (avec un examen particulier du domaine des transports aériens) : Conséquences dans l'ordre juridique interne", 27 *CDE* 317 (1991).
- Claudel Emmanuelle**, "Concurrence : Projet de loi sur les nouvelles régulations économiques", 53 *RTDComm.* 606 + 877 (2000).
- Claudel Emmanuelle**, "Pratiques anticoncurrentielles : À propos du règlement CE n° 1/2003 du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 CE : Une réelle décentralisation du droit de la concurrence?", *Petites Affiches*, 20-5-2003, No. 100, 7.
- Coleman Martin and Grenfell Michael**, *The Competition Act 1998, Law and Practice* (Oxford, 1999).
- Collins D. Wayne and Sunshine C. Steven**, "Is Private Enforcement Effective Antitrust Policy?", in: Slot & McDonnell (Eds.), *Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (London, 1993).
- Cooke D. John**, "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper", in: *The Modernisation of EC Competition Law: The Next Ten Years*, CELS Occasional Paper, No. 4 (Cambridge, 2000).
- Cooke D. John**, "Commission White Paper on Decentralisation of Competition Rules: The Threat to Consistency", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Cooke D. John**, "Centralised Subsidiarity: The Reform of Competition Law Enforcement", 10 *IJEL* 4 (2001).
- Cooke D. John**, "General Report", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004).
- Cot Jean-Mathieu**, "Les enjeux de la réforme : Le point de vue d'un juriste", (2001-7/8) *Rev.Conc.Consomm.* 13.
- Creus Antonio and Fernández Vicién Cani**, "Rapport espagnol", in: *XVIII congrès FIDE (Stockholm. 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).

- Curtin Deirdre and Mortelmans Kamiel**, "Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script", in: Curtin & Heukels (Eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, Vol. II (Dordrecht/Boston/London, 1994).
- Cutting Michael**, "Competition Law in the United Kingdom", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. II, *United Kingdom, Ireland, Germany, Austria, Finland, Sweden, Denmark and Greece* (The Hague/Deventer, 2002).
- D'Alessandro Elena**, "Pregiudizialità comunitaria ed arbitrato interno", 7 Riv.Arbitrato 445 (1997).
- D'Attorre Giacomo**, "Una 'ragionevole' concorrenza: Il ruolo della 'rule of reason' dopo la riforma del diritto antitrust comunitario", 31 Giurispr.Comm. I-80 (2004).
- Dagtolglou D. Prodromos**, *European Community Law*, Vols. I + II, (Athens, 1985 + 1998) [in Greek].
- Dalhuisen H. Jan**, "The Arbitrability of Competition Issues", 11 Arb.Int'l 151 (1995).
- Davies John and Das Manish**, "Private Enforcement of Commission Commitment Decisions: A Steep Climb, not a Gentle Stroll", in: Hawk (Ed.), *International Antitrust Law and Policy 2005, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2006).
- Davis W. Ronald**, "Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury", 70 Antitrust LJ 697 (2003).
- De Bauw Herman, Tallon Alex, Dubois Jean, Zonnekeyn Geert, Diamant Nicole, Braun Antoine, Fierens Jean-Pierre, Smeets Dominique, Verdonck Carmen, Poncelet Albert and Dessard Daniel**, "La modernisation belge après la modernisation européenne du droit de la concurrence - Le nouveau projet de loi sur la protection de la concurrence économique n'apporte pas de véritable révolution: Une opportunité à pourtant saisir?", (2006) *Electronic-Revue de la Concurrence*, March Issue, in: <http://www.ligue.org>.
- De Búrca Gráinne**, "National Procedural Rules and Remedies: The Changing Approach of the Court of Justice", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997).
- De Búrca Gráinne**, "Differentiation within the Core: The Case of the Common Market", in: De Búrca & Scott (Eds.), *Constitutional Change in the EU, From Uniformity to Flexibility* (Oxford/Portland, 2000).
- De Gryse Ludovic**, "Quelques propos sur l'arbitrage en matière des brevets d'invention", in: *Jura vigilantibus, Antoine Braun, les droits intellectuels, le barreau* (Bruxelles, 1994).
- De Mello Xavier**, "Arbitrage et droit communautaire", (1982) Rev.Arb. 349.
- De Smijter Eddy, Stropp Constanze and Woods Donncaadh**, "Green Paper on Damages Actions for Breach of the EC Antitrust Rules", (2006-1) *EC Competition Policy Newsletter* 1.
- Delaume R. Georges**, "L'arbitrage transnational et les tribunaux nationaux", 111 JDI (*Clunet*) 521 (1984).
- Derains Yves**, "Report", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993).
- Derains Yves**, "State Courts and Arbitrators", in: *Arbitration in the Next Decade - Special Supplement 1999*, The ICC International Court of Arbitration Bulletin (Paris, 1999).
- Derains Yves**, "Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Derains Yves**, "La pratique de l'administration de la preuve dans l'arbitrage commercial international", (2004) Rev.Arb. 781.

- Deringer Arved and Tessin Claus**, "Das erste Kartellgesetz des Gemeinsames Marktes", 15 AWD 989 (1962).
- Deringer Arved**, "The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty", 1 CMLRev. 30 (1963-1964).
- Deringer Arved**, "Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)", 11 EuZW 5 (2000).
- Deringer Arved**, "Reform der Durchführungsverordnung zu den Art. 81 und 82 des EG-Vertrages", 36 EuR 306 (2001).
- Desai S. Kiran**, "Antitrust Compliance Programmes", in: *The European Antitrust Review 2000, Global Competition Review Special Report* (London, 1999).
- Deselaers Wolfgang and Obst Silke**, "Weißbuch zum Europäischen Kartellrecht - Rechtssicherheit ade?", 11 EWS 41 (2000).
- Di Via Luciano**, "L'applicazione del principio di sussidiarietà nel diritto della concorrenza italiano e comunitario", 1 Contr. & Impr. (Eur.) 71 (1996).
- Dieckmann Holger**, in: Wiedemann (Ed.), *Handbuch des Kartellrechts* (München, 1999).
- Diez de Velasco Manuel**, "L'acquis communautaire : La contribution de Monsieur le Juge Kakouris à son développement", in: *Problèmes d'interprétation à la mémoire de Constantinos N. Kakouris* (Athènes/Komotini/Bruxelles, 2004).
- Dimolitsa K. Antonias**, "Issues Concerning the Existence, Validity and Effectiveness of the Arbitration Agreement (Nullity of Main Contract, Arbitrability, Capacity, Concurrent Court Proceedings, Pre-arbitral Conditions Stipulated in Contract, Group of Companies)", 7(2) ICC Bull. 14 (1996).
- Dimolitsa K. Antonias**, "The Development and the Ensuing Misconceptions of *Kompetenz-Kompetenz* in Arbitration", 4 *Dikaio Epicheiriseon kai Etairion* 1181 (1998) [in Greek].
- Dimolitsa Antonias**, "Autonomie et 'Kompetenz-Kompetenz'", (1998) Rev.Arb. 305.
- Doherty Barry**, "Community Exemptions in National Law", 15 ECLR 315 (1994).
- D'Ormesson Olivier and Kerjean Stéphane**, "Le developpement de la pratique des engagements en matière de contrôle communautaire des concentrations", 34 RTDE 479 (1998).
- Dougan Michael**, "Cutting your Losses in the Enforcement Deficit: A Community Right to the Recovery of Unlawfully Levied Charges?", 1 CYELS 233 (1998).
- Drahos Michaela**, *Convergence of Competition Laws and Policies in the European Community, Germany, Austria, and the Netherlands* (The Hague/London/Boston, 2001).
- Drake Sara**, "State Liability under Community Law for Judicial Error: A False Dawn for the Effective Protection of the Individual's Community Rights", 11 IJEL 34 (2004).
- Drexel Josef**, "Do We Need 'Courage' for International Antitrust Law? Choosing between Supranational and International Law Principles of Enforcement", in: Drexel (Ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law* (Berne/The Hague/London/New York, 2003).
- Dryllerakis K. Ioannis**, "The Relationship Between Block Exemption Regulations and National Competition Law", 50 *Epitheorisi Emporikou Dikaïou* 447 (1999) [in Greek].
- Du Jardin Laurent**, "Arbitrage v. expertise en droit de la distribution", in: *Arbitration and Commercial Distribution, Reports of the Colloquium of CEPANI (November 17th 2005)* (Bruxelles, 2005).
- Dubey Bernard**, "Administration indirecte et fédéralisme d'exécution en Europe", 39 CDE 87 (2003).
- Dubos Olivier**, *Les juridictions nationales, juge communautaire, Contribution à l'étude des transformations de la fonction juridictionnelle dans les États-membres de l'Union européenne* (Paris, 2001).

- Ebbing Frank, "Class Action, Die Gruppenklage: Ein Vorbild für das deutsche Recht?", 103 ZVgl.RWiss. 31 (2004).
- Edward A.O. David and Robinson William, "Is there a Place for Private Law Principles in Community Law?", in: Heukels & McDonnell (Eds.), *The Action for Damages in Community Law* (The Hague/London/Boston, 1997).
- Edward A.O. David, "The Modernisation of EC Antitrust Policy: Issues for Courts and Judges", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Edward A.O. David, "Direct Effect - Myth, Mess or Mystery?", 7 Dir.Un.Eur. 215 (2002) = in: Prinssen & Schrauwen (Eds.), *Direct Effect, Rethinking a Classic of EC Legal Doctrine* (Groningen, 2002).
- Ehlermann Claus-Dieter, "Ein Plädoyer für die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedstaaten", in: Capotorti, Ehlermann et al. (Eds.), *Du Droit International au Droit de l'Intégration, Liber Amicorum Pierre Pescatore* (Baden-Baden, 1987).
- Ehlermann Claus-Dieter, "Ist die Veromung Nr. 17 noch zeitgemäß?", 43 WuW 997 (1993).
- Ehlermann Claus-Dieter, "Developments in Community Competition Law Procedures", 1(1) *EC Competition Policy Newsletter* 2 (1994).
- Ehlermann Claus-Dieter, "Community Competition Law Procedures", in: Slynn & Pappas (Eds.), *Procedural Aspects of EC Competition Law* (Maastricht, 1995).
- Ehlermann Claus-Dieter, "Il dibattito sulla sussidiarietà nel diritto della concorrenza", in: Autorità garante della concorrenza e del mercato (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995).
- Ehlermann Claus-Dieter, "Reflections on a European Cartel Office", 32 CMLRev. 471 (1995).
- Ehlermann Claus-Dieter, "Anwendung des Gemeinschaftskartellrechts durch Behörden und Gerichte der Mitgliedstaaten", in: Randelzhofer, Scholz & Wilke (Eds.), *Gedächtnisschrift für Eberhard Grabitz* (München, 1995).
- Ehlermann Claus-Dieter, "The Evolution in Relations between the EC Commission and National Antitrust Authorities", in: *Antitrust fra diritto nazionale e diritto comunitario, Atti del II convegno di Treviso (5-6 Maggio 1995)* (Milano, 1996).
- Ehlermann Claus-Dieter, "Decision Making at the Centre - Working Paper II", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997).
- Ehlermann Claus-Dieter, "Cooperation Between Competition Authorities within the European Union", in: Raffaelli (Ed.), *Antitrust Between EC Law and National Law, Treviso 15-16 May 1997* (Bruxelles/Milano, 1998).
- Ehlermann Claus-Dieter, "The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution", 37 CMLRev. 537 (2000).
- Ehlermann Claus-Dieter, "Coherent Application of EC Competition Law in a System of Parallel Competencies", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_ehlermann.pdf.
- Ehlermann Claus-Dieter, "Artikel 3 des Kommissionsvorschlags vom September 2000 - Wohlbegründet!", Kommentar, 51(3) WuW (2001).
- Ehlermann Claus-Dieter and Komninos P. Assimakis, "The Consequences of the Proposed Modernisation of the Community Competition Law Enforcement", 21 RHDE 745 (2001) [in Greek].

- Ehlermann Claus-Dieter and Atanasiu Isabela**, "The Modernization of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts", 23 ECLR 72 (2002).
- Eilmansberger Thomas and Thyri Peter**, "Austria", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004).
- Ellger Reinhard**, "Das Verhältnis der Wettbewerbsregeln des EG-V zu den Gesetzen gegen Wettbewerbsbeschränkungen in den Mitgliedstaaten der Europäischen Gemeinschaft: Vom Vorrangprinzip zur Exklusivitätsregeln", in: Basedow, Drobnig *et al.* (Eds.), *Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht* (Tübingen, 2001).
- Engsig Sørensen Karsten**, "Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?", 43 CMLRev. 423 (2006).
- Erämetsä Pirkko**, "Finland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria* (Baden-Baden, 2001).
- Erauw Johan**, "Reference by Arbitrators to the European Court of Justice for Preliminary Rulings", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997).
- Esteva Mosso Carles and Ryan Stephen**, "Article 82: Abuse of a Dominant Position", in: Faull & Nikpay (Eds.), *The EC Law of Competition* (Oxford, 1999).
- Fasquelle Daniel**, "La réparation des dommages causés par les pratiques anticoncurrentielles", 51 RTDComm. 763 (1998).
- Fasquelle Daniel**, "Les dommages et intérêts en matière anticoncurrentielle", (2000-5/6) Rev.Conc.Consomm. 14.
- Faull M.H. Jonathan**, "The Enforcement of Competition Policy in the European Community: A Mature System", in: Hawk (Ed.), *EC and US Competition Policy 1991, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1992).
- Faull M.H. Jonathan**, "Future Competition Law - Working Paper II", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998).
- Favre Claire**, "Les défis de la mise en œuvre : Une compétence élargie pour les juges", (2001-7/8) Rev.Conc.Consomm. 21.
- Favre Claire**, "Le droit communautaire de la concurrence devant les juridictions nationales : L'expérience française", in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001).
- Fejøl Jens**, "Denmark", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria* (Baden-Baden, 2001).
- Fellenius-Omnell Caroline, Landström Charlotte and Coyet Johan**, "Modernizing EC Competition Law: Will a System of Parallel Application of EC and National Competition Laws Ensure Convergence?", in: Hawk (Ed.), *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy 2002* (New York, 2003).
- Fine L. Frank**, "The EU's New Antitrust Rules for Technology Licensing: A Turbulent Harbour for Licensors", 29 ELRev. 766 (2004).
- Fine L. Frank**, *The EC Competition Law of Technology Licensing* (London, 2006).
- Fines Francette**, "L'application uniforme du droit communautaire dans la jurisprudence de la Cour de justice des Communautés européennes", in: *Études en l'honneur de Jean-Claude Gautron, Les dynamiques du droit européen en début de siècle* (Paris, 2004).
- Fingleton John**, "De-monopolising Ireland", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?* (Oxford/Portland, 2006).
- Flynn James and Stratford Jenima**, *Competition: Understanding the 1998 Act* (Bembridge, 1999).

- Folguera Jaime**, "The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001).
- Forrester S. Ian**, "Complement or Overlap? Jurisdiction of National and Community Bodies in Competition Matters after *SABAM*", 11 CMLRev. 171 (1974).
- Forrester S. Ian and Norall Christopher**, "The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be Applied", 21 CMLRev. 11 (1984).
- Forrester S. Ian**, "Modernisation of EC Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Forrester S. Ian**, "The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Forrester S. Ian**, "Modernisation: An Extension of the Powers of the Commission?", in: Geradin (Ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerp/Oxford, 2004).
- Fouchard Philippe**, "L'arbitrage - Les règles de procédure face aux problèmes économiques", 11 RIDE 237 (1997).
- Fox M. Eleanor**, "Modernisation: Efficiency, Dynamic Efficiency, and the Diffusion of Competition Law", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Francis P.B. Benedict**, "Subsidiarity and Antitrust: The Enforcement of European Competition Law in the National Courts of Member States", 27 Law & Pol'y Int'l Bus. 247 (1995).
- Freeman Peter and Whish Richard**, *A Guide to the Competition Act 1998* (London/Edinburgh/ Dublin, 1999).
- Frenz Walter**, *Handbuch Europarecht, Vol. I, Europäische Grundfreiheiten* (Berlin/Heidelberg/New York, 2004).
- Frignani Aldo, Gentile Enrico and Rossi Giuseppe**, "La devolution dell'antitrust: Prime riflessioni intorno al 'libro bianco' sulla modernizzazione", 2 Merc.Conc.Reg. 171 (2000).
- Frignani Aldo**, "Competition Law in Italy", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland, Vol. I, EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland* (The Hague/Deventer, 2000).
- Fuchs Andreas**, "Die Modernisierung des europäischen Kartellrechts im Bereich vertikaler Vereinbarungen", in: Schwintowski (Ed.), *Entwicklungen im deutschen und europäischen Wirtschaftsrecht, Symposium zum 65. Geburtstag von Ulrich Immenga* (Baden-Baden, 2001).
- Furse Mark**, *Competition Law of the UK and EC* (London, 2000).
- Gaeta Francesco**, "La comunicazione sulla cooperazione tra la Commissione europea e le autorità antitrust nazionali", 38 Riv.Dir.Eur. 563 (1998).
- Gaillard Emmanuel and Savage John**, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague/Boston/London, 1999).
- Gaillard Emmanuel**, "The Negative Effect of Competence-Competence", 17(1) *Mealey's International Arbitration Report* 27 (2002).
- Gaitis M. James**, "International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards", 15 Am.Rev.Int'l Arb. 9 (2004).
- Gaja Giorgio**, *Introduzione al diritto comunitario* (Bari, 2000).

- Galinsky Ruth**, "The Resolution of Conflicts Between UK and Community Competition Law", 15 ECLR 16 (1994).
- Gallot Jérôme**, "Protection Efficace de la Concurrence dans une Communauté Élargie grâce à l'Association des Autorités de Concurrence et des Juridictions Nationales", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_gallot.pdf.
- García Cachafeiro Fernando**, "El giro norteamericano del derecho antitrust comunitario: El artículo 1 de la Sherman Act", 256 *Revista de Derecho Mercantil* 597 (2005).
- Gastinel Eric**, "Plaidoyer pour la reconnaissance de l'effet direct à l'article 85, paragraphe 3, du Traité de Rome", D. 1996.53.
- Gaudin Hélène**, "Diversité et évolution des champs d'application en droit communautaire", 13-14 RAE/LEA 7 (2003-2004).
- Gauer Céline, Dalheimer Dorothe, Kjølbye Lars and De Smijter Eddy**, "Regulation 1/2003: A Modernised Application of EC Competition Rules", (2003-1) *EC Competition Policy Newsletter* 3.
- Gauer Céline, Dalheimer Dorothe, De Smijter Eddy, Schnichels Dominik and Laurila Maija**, "Regulation 1/2003 and the Modernisation Package Fully Applicable since 1 May 2004", (2004-2) *EC Competition Policy Newsletter* 1.
- Gauer Céline**, "Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004).
- Gauer Céline**, "Les programmes de clémence au regard du réseau communautaire", 3/2005 *Concurrences* 16.
- Gauer Céline and Jaspers Maria**, "The European Competition Network: A achievements and Challenges – A Case in Point: Leniency", (2006-1) *EC Competition Policy Newsletter* 8.
- Gautron Jean-Claude**, "Subsidiarité ou neo-subsidiarité", 8 RAE/LEA 3 (1998).
- Gavalda Christian and Parleani Gilbert**, *Droit des affaires de l'Union européenne* (Paris, 2002).
- Geimer Reinhold and Schütze A. Rolf**, *Europäisches Zivilverfahrensrecht, Kommentar zum EuGVÜ und zum Lugano-Übereinkommen* (München, 1997).
- Gentile Enrico**, "La svolta di inizio millennio del diritto comunitario della concorrenza: Il nuovo approccio economico, la semplificazione delle norme, la cooperazione internazionale e la modifica del regolamento 17/62", 5 *Contr. & Impr. (Eur.)* 557 (2000).
- Georgiades S. Apostolos**, *General Part of Civil Law* (Athens/Komotini, 2002).
- Gerber J. David**, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, 1998).
- Gerber J. David**, "Modernising European Competition Law: A Developmental Perspective", 22 ECLR 122 (2001).
- Gerber J. David and Cassinis Paolo**, "The 'Modernisation' of European Community Competition Law: Achieving Consistency in Enforcement – Parts I + II", 27 ECLR 10 + 51 (2006).
- Gifford J. Daniel and Kudrle T. Robert**, "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?", 48 *Antitrust Bull.* 727 (2003).
- Gilles Peter**, "Vereinheitlichung und Angleichung unterschiedlicher nationaler Rechte – Die Europäisierung des Zivilprozeßrechts als ein Beispiel", 7 *ZZPInt.* 3 (2002).
- Gilliams M. Hans**, "Modernisation: From Policy to Practice", 28 *ELRev.* 451 (2003).
- Goffin Léon**, "L'arbitrage et le droit européen", 67 *RDIDC* 315 (1990).

- Goldman Berthold**, "Un traité fédérateur : La convention entre les États membres de la CEE sur la reconnaissance et l'exécution des décisions en matière civile et commerciale", 7 RTDE 1 (1971).
- Goldman Berthold**, "The Complementary Roles of Judges and Arbitrators in Ensuing that International Commercial Arbitration is Effective", in: *International Arbitration, 60 Years of ICC Arbitration, A Look at the Future*, ICC Court of Arbitration (Paris, 1984).
- Golfiopoulou Maria**, *Regulation EEC/556/89 on Know-How Licensing* (Athens/Komotini, 1989) [in Greek].
- Goyder G. Dan**, "Reliance on Commission Decisions in National Courts", in: Andenas & Jacobs (Eds.), *European Community Law in the English Courts* (Oxford, 1998).
- Goyder G. Dan**, "Providing Support for National Judges in Dealing with Competition Cases", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Goyder G. Dan**, *EC Competition Law* (Oxford, 2003).
- Greaves Rosa**, "Concurrent Jurisdiction in EEC Competition Law: When Should a National Court Stay Proceedings?", 8 ECLR 256 (1987).
- Greaves Rosa**, "EC Competition Law: Centralised or Decentralised Enforcement", *Focus*, [2000] 11 Euro.CL xi.
- Green Nicholas**, "The Treaty of Rome, National Courts, and English Common Law: The Enforcement of European Competition Law after *Milk Marketing Board*", 48 *RechtsZ* 509 (1984).
- Green Nicholas**, "Rapport britannique", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).
- Green Nicholas**, "Practical Implications of Reform", in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000).
- Gröning Jochem**, "National Judges in a Modernised Community Law System: A Special View to Procedural Aspects", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Gröning Jochem**, "Die dezentrale Anwendung des EG-Kartellrechts gemäß dem Vorschlag der Kommission zur Ersetzung der VO 17/62", 47 WRP 83 (2001).
- Grossen Jacques-Michel**, "Arbitrage et droit de la concurrence", in: Reymond & Bucher (Eds.), *Recueil de travaux Suisses sur l'arbitrage international* (Zürich, 1984).
- Grynfolgel Catherine**, *Droit communautaire de la concurrence* (Paris, 1997).
- Günther Stefan**, "Österreich", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria* (Baden-Baden, 2001).
- Gustafsson Magnus**, "Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era", 27(2) LIEI 159 (2000).
- Gyselen Luc**, "Comment from the Point of View of EU Competition Law", in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001).
- Gyselen Luc**, "The Substantive Legality Test under Article 81-3 EC Treaty - Revisited in Light of the Commission's Modernization Initiative", in: Von Bogdandy, Mavroidis & Mény (Eds.), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague/London/New York, 2002).
- Gyselen Luc**, "EC Anti-trust Law Enforcement within the European Competition Network", in: *The PLC Global Counsel Competition Law Handbook 2004/5* (London, 2004).

- Hahn Dominique**, *L'arbitrage commercial international en Suisse face aux règles de concurrence de la CEE* (Genève, 1983).
- Hakenberg Waltraud and Stix-Hackl Christine**, *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*, Vol. I (Wien, 2005).
- Hambloch Sibylle**, "Die Entstehung der Verordnung 17 von 1962 im Rahmen der EWG-Wettbewerbspolitik", 37 EuR 877 (2002).
- Hanotiau Bernard**, "L'arbitrage et le droit européen de la concurrence", in: Briner, Derains et al. (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997).
- Hartley C. Trevor**, *European Union Law in a Global Context, Text, Cases and Materials* (Cambridge, 2004).
- Hatzopoulos G. Vassilis**, *The Essential Facilities Doctrine in EU and Greek Competition Law* (Athens/Komotini, 2002) [in Greek].
- Hawk E. Barry and Huser L. Henry**, *European Community Merger Control: A Practitioner's Guide* (The Hague/London/Boston, 1996).
- Hawk E. Barry and Denaeijer Stanton Nathalie**, "The Development of Articles 81 and 82 EC Treaty: Legal Certainty", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Hempel Rolf**, "Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle", 55 WuW 362 (2004).
- Hepting Reinhard**, "Art. 177 EWGV und die private Schiedsgerichtsbarkeit", 17 EuR 315 (1982).
- Herbert F.**, "Rapports entre les procédures devant la Commission des CE et les juridictions nationales", 42 Riv.Dir.Ind. 1461 (1993).
- Hermanns Ferdinand**, "Public Policy and Arbitration - Cartel Law", in: Böckstiegel (Ed.), *Acts of State and Arbitration* (Köln/Berlin/Bonn/München, 1997).
- Hesselink W. Martijn**, "The European Commission's Action Plan: Towards a More Coherent European Contract Law?", 12 ERPL 397 (2004).
- Hetsch Patrick**, "Arbitration in Community Law", 6(2) ICC Bull. 47 (1995).
- Heukamp Friso**, *Schiedszusagen in der Europäischen Fusionskontrolle* (Köln/Berlin/München, 2006).
- Hildebrand Doris**, *Economic Analyses of Vertical Agreements – A Self-Assessment* (The Hague, 2005).
- Hintersteiner Margit Maria**, "Gemeinschaftsrechtliche Schadenersatzpflicht bei Verstoß gegen 81 EG", 16 WBl. 554 (2002).
- Hinton F. Eric**, "European Community Competition Law, Subsidiarity, and the National Courts", 11 BYU JPub.L 301 (1997).
- Hirsch Günter**, "Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte", 1 ZWeR 233 (2003).
- Holley L. Donald**, "EEC Competition Practice: A Thirty-year Retrospective", in: Hawk (Ed.), *International Antitrust Law and Policy 1992, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1993).
- Holmes Katherine**, "The EC White Paper on Modernisation", 23(4) *World Competition* 51 (2000).
- Hoskins Mark**, "Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules", 13 ECLR 257 (1992).
- Hoskins Mark**, "Suing the HL in Damages: Career Suicide or Community Law Right?", 9 *Judicial Review* 278 (2004).
- Hossenfelder Silke**, "The Development of the Bundeskartellamt's Position on the Modernisation Proposals of the Commission", in: *European Competition Law: A New Role*

for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers (Bruxelles, 2001).

Hovenkamp Herbert, Janis Mark and Lemley A. Mark, "Anticompetitive Settlement of Intellectual Property Disputes", 87 Minn.LRev. 1719 (2003).

Hubeau Francis, "La nullité, au sens de l'article 85§2 du Traité CEE des accords et décisions incompatibles avec le marché commun", in: *Liber amicorum Josse Mertens de Wilmars* (Antwerpen/Zwolle, 1982).

Huniar Kristin, "The Enforcement Directive: Its Effects on UK Law", 28 EIPR 92 (2006).

Idot Laurence, "La situation des victimes de pratiques anticoncurrentielles après les arrêts *Asia Motor* et *Automec IF*", (1992-12) *Europe* 1.

Idot Laurence, "Judicial Control and Enforcement of the Arbitral Award: Rapport Introductif", in: *Competition and Arbitration Law*, Institute of International Business Law and Practice, ICC (Paris, 1993).

Idot Laurence, "Les mesures provisoires en droit de la concurrence : Un nouvel exemple de symbiose entre le droit français et le droit communautaire de la concurrence", 29 RTDE 581 (1993).

Idot Laurence, "Les règles applicables aux entreprises", 8 RAE/LEA 114 (1998).

Idot Laurence, "À propos des engagements en droit de la concurrence : Quelques réflexions sur la pratique communautaire et française", 35 CDE 569 (1999).

Idot Laurence, "La révision du règlement 17/62 ou l'ouverture de la 'boîte de Pandore'", (1999-8/9) *Europe* 3.

Idot Laurence, "La liberté de concurrence en France", *Petites Affiches*, 23-3-2000, No. 59, 5.

Idot Laurence, "L'efficacité des décisions dans l'espace", *Petites Affiches*, 28-12-2000, No. 259, 29.

Idot Laurence, "L'application des articles 81 et 82 CE : L'entrée dans le nouveau millénaire...", (2000-12) *Europe* 3.

Idot Laurence, "Une innovation surprenante : L'introduction de l'arbitrage dans le contrôle communautaire des concentrations", (2000) *Rev.Arb.* 591.

Idot Laurence and Van de Walle de Ghelke Bernard, "Le besoin de sécurité juridique : Notifications et exemptions", 37 CDE 160 (2001).

Idot Laurence, "A French Point of View on the Radical Decentralisation of the Implementation of Article 81(1) and (3)", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Idot Laurence, "La modernisation des règles européennes de concurrence : Réforme, procédurale ou institutionnelle", (2001-7/8) *Rev.Conc.Consomm.* 7.

Idot Laurence, "Arbitration and the Reform of Regulation 17/62", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).

Idot Laurence, "Premières vues sur le nouveau règlement de mise en œuvre des articles 81 et 82 CE", (2003-2) *Europe* 4.

Idot Laurence, "Les entreprises face à la suppression de l'autorisation préalable", Paper Presented at the ICC (20 November 2003).

Idot Laurence, "2004 : L'an 1 du nouveau droit de la concurrence?", (2004-1) *Europe* 3.

Idot Laurence, "France", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004).

Idot Laurence, *Droit communautaire de la concurrence, Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Paris/Brussels, 2004).

- Idot Laurence**, "A Necessary Step towards Common Procedural Standards of Implementation for Articles 81 and 82 EC within the Network", in: Ehlermann & Atanasiiu (Eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford/Portland, 2004).
- Idot Laurence**, "L'entrée en vigueur du règlement n° 1/2003 : Les dispositions procédurales du 'paquet modernisation'", (2004-5) *Europe* 4.
- Idot Laurence**, "Une question d'actualité en droit de la concurrence : Programmes de clémence et internationalisation", in: *Droit et actualité, Études offertes à Jacques Béguin* (Paris, 2005).
- Idot Laurence**, "The Application of EC Competition Rules by national Courts: Remarks by a French Academic", Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005).
- Igartua Arregui Iñigo**, "Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain", LIDC Questions 2001/2002, in: <http://www.ligue.org>.
- Iliopoulos P. Constantin**, "Griechenland", in: Behrens (Ed.), *EC Competition Rules in National Courts*, Vol. V, *Spain, Portugal and Greece* (Baden-Baden, 2000).
- Immenga Ulrich**, "Coherence: A Sacrifice of Decentralisation?", in: Ehlermann & Atanasiiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Ioannou M. Krateros**, "The National Judge and Community Competition Law", 4 RHDE 423 (1984) [in Greek].
- Jacobs G. Francis**, "Civil Enforcement of EEC Antitrust Law", in: *The Art of Governance, Festschrift zu Ehren von Eric Stein*, Michigan Law Review Association (Baden-Baden, 1987) = 82 Mich.LRev. 1364 (1984).
- Jacobs G. Francis**, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997).
- Jacobs G. Francis and Deisenhofer Thomas**, "Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective", in: Ehlermann & Atanasiiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Jacobs Georges**, "Modernisation de la politique communautaire de la concurrence : Une réflexion des entreprises", *Petites Affiches*, 5-11-2001, No. 220, 30.
- Jaeger Wolfgang**, "Die möglichen Auswirkungen einer Reform des EG-Wettbewerbsrechts für die nationalen Gerichte", 50 WuW 1062 (2000).
- Jalabert-Doury Nathalie**, "Livre blanc sur la modernisation de l'application des articles 81 & 82 : Quel avenir pour le droit de la concurrence communautaire?", (1999) RDAI/IBLJ 497.
- Jalabert-Doury Nathalie**, "Concurrence européenne et internationale : Le projet de nouveau règlement d'application des articles 81 et 82 TCE", (2001) RDAI/IBLJ 55.
- Jenny Frédéric Yves**, "On the Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasiiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Jenny Frédéric Yves**, "Un économiste à la Cour", 1/2005 *Concurrences* 5.
- Joerges Christian**, "Economic Law, the Nation-State and the Maastricht Treaty", in: Dchousse (Ed.), *Europe after Maastricht: An Ever Closer Union?* (München, 1994).
- Joerges Christian**, "The Bright and the Dark Side of the Consumer's Access to Justice in the EU", 1(2) *Global Jurist Topics*, Article 1 (2001).

- Joerges Christian**, *Sur la légitimité d'eupéaniser le droit privé, Plaidoyer pour une approche procédurale*, EUI Working Paper, Law No. 2004/4.
- Joliet René**, *Le droit institutionnel des Communautés européennes, Les institutions, les sources, les rapports entre ordres juridiques* (Liège, 1983).
- Jones Alison**, *Restitution and European Community Law* (London, 2000).
- Jones Alison and Sufrin Brenda**, *EC Competition Law, Text, Cases, and Materials* (Oxford, 2004).
- Jones A. Clifford and Sharpston Eleanor**, "Beyond *Delimitis*: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation", 3 Columbia JEL 85 (1996-97).
- Jones A. Clifford**, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford, 1999).
- Jones A. Clifford**, "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Jones A. Clifford**, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27 *World Competition* 13 (2004).
- Jones Keith**, "Litigating Competition Cases in the UK", in: *Lawyers' Europe*, Spring 2002, 2.
- Jones Tim**, "Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform", 22 ECLR 405 (2001).
- Joris Vincent**, "Communication relative à la coopération entre la Commission et les juridictions nationales pour l'application des articles 85 et 86 : Cas d'application jusqu'à présent", (1998-4) *EC Competition Policy Newsletter* 47.
- Kaissis G. Athanassios**, "Europarecht und Schiedsgerichtsbarkeit: Ein Überblick über die Rechtsprechung des EuGH zu Fragen der Schiedsgerichtsbarkeit", in: Kaissis & Mavromatis (Eds.), *Advantages of Arbitration in Greece and Balkan Countries* (Thessaloniki, 1999).
- Kakouris N. Constantinos**, "Do the Member States Possess Judicial Procedural 'Autonomy'?", 34 CMLRev. (1997) 1389.
- Kakouris N. Constantinos**, "Special Administrative Courts of the Member States and the Court of the European Communities", in: Kakouris (Ed.), *Perspectives, droit communautaire européen, théorie générale du droit, domaine méta-juridique* (Athènes/Komotini, 1998).
- Kamann Hans-Georg and Horstkotte Christian**, "Kommission versus nationale Gerichte - Kooperation oder Konfrontation im Kartellverfahren: Das *Masterfoods*-Urteil des EuGH im Licht der geplanten Kartellverfahrensverordnung", 51 WuW 458 (2001).
- Kamerling Alexandra and Osman Christopher**, *Restrictive Covenants under Common and Competition Law* (London, 2004).
- Kapteyn J.G. Paul, VerLoren van Themaat Pieter, Geelhoed A. Leendert, Timmermans W.A. Christiaan and Gormley W. Lawrence**, *Introduction to the Law of the European Communities, From Maastricht to Amsterdam* (London/The Hague/Boston, 1998).
- Karageorgou I. Vassiliki**, *Administrative Procedure under the Influence of European Integration* (Athens/Thessaloniki, 2005) [in Greek].
- Karakostas Ioannis and Yannopoulou Elena**, *Community Law Rules and National Civil Law, Problems-Legislation* (Athens, 1997) [in Greek].
- Karydis S. Georgios**, "The Impact of Competition Rules on the Institution of Arbitration: Treatment in French, Greek and Community Law", 37 *Nomiko Vima* 1024 (1989) [in Greek].
- Keeling T. David**, *Intellectual Property Rights in EU Law, Vol. I, Free Movement and Competition Law* (Oxford, 2003).
- Kerameus D. Konstantinos**, "Civil Procedure in Greece", 2 South.LRev. 175 (1976) = in: Kerameus (Ed.), *Studia Iuridica I* (Thessaloniki, 1980).

- Kerameus D. Konstantinos**, "The Examination of an Arbitration Agreement by State Courts while Arbitration Is Pending", 42-43 RHD 217 (1989-90) = in: Kerameus (Ed.), *Studia Iuridica III* (Athens, 1995).
- Kerameus D. Konstantinos**, "Procedural Harmonization in Europe", 43 Am.JComp.L 401 (1995).
- Kerameus D. Konstantinos**, "Enforcement in the International Context", in: 264 Rec.Cours 179 (1997).
- Kerameus D. Konstantinos**, "Procedural Tools in the Different European States Concerning the Uniform Interpretation of Law by the Supreme Courts: A Comparative Presentation", 53 RHD 613 (2000).
- Kerameus D. Konstantinos**, *Methods of Appeal* (Athens/Thessaloniki, 2002) [in Greek].
- Kerse S. Christopher**, "The Complainant in Competition Cases: A Progress Report", 34 CMLRev. 213 (1997).
- Kerse S. Christopher**, *EC Antitrust Procedure* (London, 1998).
- Keserauskas Šarūnas**, "Practical Implications of the EC Antitrust Enforcement Revolution", in: <http://www.lpv.lt/en/docs/download/341.php>.
- Kilpatrick Claire**, "The Future of Remedies in Europe", in: Kilpatrick, Novitz & Skidmore (Eds.), *The Future of Remedies in Europe* (Oxford/Portland, 2000).
- Kingston Suzanne**, "A 'New Division of Responsibilities' in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call", 22 ECLR 340 (2001).
- Kirchner Christian**, "Verhältnis zwischen deutschem Kartellrecht und europäischem Wettbewerbsrecht - Zuständigkeiten, Konflikte, Reformkonzepte", in: *Schwerpunkte des Kartellrechts 2001, Referate des XXIX. FIW-Seminars* (Köln/Berlin/Bonn/München, 2002).
- Kist Anne Willem and Tierno Centella Maria Luisa**, "Coherence and Efficiency in a Decentralised Enforcement of EC Competition Rules: Some Reflections on the White Paper on Modernisation", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Kjølbye Lars**, "The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81", 25 ECLR 566 (2004).
- Klaue Siegfried**, "Einige Bemerkungen über die Zukunft der Zweischrankentheorie", in: Baur, Hopt & Mailänder (Eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13 März 1990* (Berlin/New York, 1990).
- Koch Norbert**, "Das Verhältnis der Kartellvorschriften des EWG-Vertrags zum Gesetz gegen Wettbewerbsbeschränkungen", 14 BB 241 (1959).
- Kohler Christian**, "Das Prinzip der gegenseitigen Anerkennung in Zivilsachen im europäischen Justizraum", 124 ZSR II 263 (2005).
- Komninos P. Assimakis**, "Arbitration and the Modernisation of European Competition Law Enforcement", 24 *World Competition* 211 (2001).
- Komninos P. Assimakis**, "New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages", 39 CMLRev. 447 (2002).
- Komninos P. Assimakis**, "Introduction", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Komninos P. Assimakis**, "Assistance to Arbitral Tribunals in the Application of EC Competition Law", in: Ehlermann & Atanasu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Komninos P. Assimakis**, "Article 234 EC and National Competition Authorities in the Era of Decentralisation", 29 ELRev. 106 (2004).

- Komninos P. Assimakis**, "Resolution of Conflicts in the Integrated Article 81 EC", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2004, The Relationship Between Competition Law and the (Liberal) Professions* (Oxford/Portland, 2006).
- Komninos P. Assimakis**, "The New Amendment of the Greek Competition Act: Harmonisation with or Departure from the EU Model?", 27 ECLR 293 (2006).
- Kon Stephen**, "Article 85, Para. 3: A Case for Application by National Courts", 19 CMLRev. 541 (1982).
- Kon Stephen**, "The Commission's White Paper on Modernisation: The Need for Procedural Harmonisation", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Korah C. Valentine**, "The Judgment in *Delimitis*: A Milestone Towards a realistic Assessment of the Effects of an Agreement - Or a Dump Squib?", 8 Tul.Eur.Civ.LForum 17 (1993).
- Korah C. Valentine**, *Cases and Materials on EC Competition Law* (Oxford, 1997).
- Korah C. Valentine**, *An Introductory Guide to EC Competition Law and Practice* (Oxford/Portland, 2000).
- Korah C. Valentine and O'Sullivan Denis**, *Distribution Agreements under the EC Competition Rules* (Oxford/Portland, 2002).
- Kornblum Udo**, "Private Schiedsgerichte und Art. 177 EWGV", 2 JPS 102 (1988).
- Kotsiris E. Lambros**, *Competition Law (Free and Unfair)* (Athens/Thessaloniki, 2000) [in Greek].
- Kotsiris E. Lambros**, "The Impact of Community Law on Commercial Law", 20 RHDE 781 (2000) [in Greek].
- Koussoulis N. Stelios**, "Procedural Issues Before the Competition Committee", in: Schinas (Ed.), *Protection of Free Competition, The Practice of EPA/EA* (Athens/Komotini, 1992) [in Greek].
- Koutsoukis V. Dimitris**, "The Relationship Between Community and National Competition Law", 4 RHDE 513 (1984) [in Greek].
- Koutsoukis V. Dimitris**, "The Private Law Remedies for Infringement of Articles 85 and 86 EEC", in: *Studies in Honour of Andreas D. Loukopoulos* (Athens/Komotini, 1993) [in Greek].
- Koutsoukis V. Dimitris**, "The New Institution of Interlocutory Relief in Competition Law Cases (L. 703/77)", 48 *Epitheorisi Emporikou Dikaïou* 153 (1997) [in Greek].
- Kovar Robert**, "Intervention : Les conflits dans la réglementation des pratiques restrictives de concurrence entre l'ordre juridique communautaire et l'ordre juridique français", in: *Les conflits des réglementations dans le droit français et le droit communautaire des pratiques restrictives de concurrence, Journées d'étude de droit de la concurrence (Lyon 24 et 25 mai 1984)* (Lyon, 1985).
- Kovar Robert**, "Le règlement du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du Traité CE", D. 2003.478.
- Kreindler H. Richard**, "Arbitral Forum Shopping", in: Cremades & Lew (Eds.), *Parallel State and Arbitral Procedures in International Arbitration* (Paris, 2005).
- Kroes Neelie**, "Delivering Lisbon: The Role of Competition Policy", Speech Made at the European Liberal Democrat City Forum (London, 14 September 2005), in: <http://europa.eu.int/comm/competition/speeches>.
- Kroes Neelie**, "More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate", Opening Speech at the Conference 'Private Enforcement in EC Competition law: The Green Paper on Damages Actions' (Brussels, 9 March 2006), in: <http://europa.eu.int/comm/competition/speeches>.

- Kühn Wolfgang**, "Die Bedeutung der Gerichte bei der Durchführung von Schiedsverfahren", in: Böckstiegel (Ed.), *Schiedsgerichtsbarkeit im Umfeld von Politik, Wirtschaft und Gerichtsbarkeit* (Köln/Berlin/Bonn/München, 1992).
- Kunzlik F. Peter**, "Globalization and Hybridization in Antitrust Enforcement: European 'Borrowings' from the US Approach", 48 *Antitrust Bull.* 319 (2003).
- Lachmann Jens-Peter and König Wolfgang**, *Handbuch für die Schiedsgerichtspraxis* (Köln, 1998).
- Landolt Philipp**, *Modernised EC Competition Law in International Arbitration* (The Hague, 2006).
- Lane Robert**, *EC Competition Law* (Dorchester, 2000).
- Lang Alessandra**, "Giudice nazionale e Commissione delle Comunità europee: Coesistenza di competenze in materia di concorrenza e strumenti di coordinamento", 32 *Riv.Dir.Int.Priv.Proc.* (1996) 239.
- Lasserre Bruno**, "Propos introductifs", in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 *GP* n° 287-288 7 (2005).
- Lässig Peter**, *Dezentrale Anwendung des Europäischen Kartellrechts* (Köln/Berlin/Bonn/München, 1997).
- Lavagne Benoît**, "La réforme du droit des ententes : Le règlement du 13 décembre 2002", 46 *RMC* 526 (2003).
- Lecourt Robert**, *L'Europe des juges* (Bruxelles, 1976).
- Legrand Pierre**, "Against a European Civil Code", 60 *MLR* 44 (1997).
- Lehmann Matthias**, *Die Schiedsfähigkeit wirtschaftsrechtlicher Streitigkeiten als transnationales Rechtsprinzip* (Baden-Baden, 2003).
- Lehmann Matthias**, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice", 42 *Columbia JTransnat'l* 753 (2004).
- Lenaerts Koen and Pittie Marc**, "Conclusions générales", in: Briner, Derains *et al.* (Eds.), *L'arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997* (Bruxelles, 1997).
- Lenaerts Koen and Arts Dirk**, *Procedural Law of the European Union* (London, 1999).
- Lenaerts Koen**, "Modernisation of the Application and Enforcement of European Competition Law: An Introductory Overview", in: Stuyck & Gilliams (Eds.), *Modernisation of European Competition Law, The Commission's Proposal for a New Regulation Implementing Articles 81 and 82 EC* (Antwerp/Oxford/New York, 2002).
- Lenaerts Koen**, "De quelques principes généraux du droit de la procédure devant le juge communautaire", in: Vandersanden & de Walsche (Eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. I (Bruxelles, 2003).
- Lenaerts Koen and Gerard Damien**, "Decentralisation of EC Competition Law Enforcement: Judges in the Frontline", 27 *World Competition* 313 (2004).
- Lesguillons Henry**, "Retrait du bénéfice de l'application du règlement d'exemption restrictions verticales par les autorités compétentes des États-membres", (1999) *RDAl/IBLJ* 509.
- Lesguillons Henry**, "Comment vont s'organiser les décisions de retrait d'exemption?", 4 *Contr. & Impr. (Eur.)* 592 (1999).
- Lever Jeremy**, "Mutual Permeation of Community and National Tort Rules", in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001).

- Lever Jeremy**, "The Commission's Proposals for the Modernisation of EC Competition Law: The Relationship between Articles 81 and 82 EC and National Competition Laws", in: *Lawyers' Europe*, Autumn/Winter 2001, 2.
- Lever Jeremy**, "The German Monopolies Commission's Report on Problems Consequent upon the Reform of the European Cartel Procedures", 23 *ECLR* 321 (2002).
- Lever Jeremy**, "Restructuring Courts and Tribunals Hearing UK and EC Competition Law Cases", 1 *Comp.LJ* 47 (2002).
- Lever Jeremy**, "Substantive Remedies: The Viewpoint of an English Lawyer", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Lever Jeremy**, "The Competition Appeal Tribunal and the Ordinary Courts", in: Hutchings & Andenas (Eds.), *Competition Law Yearbook 2002* (London, 2003).
- Lévy Laurent**, "Anti-suit Injunctions Issued by Arbitrators", in: Gaillard (Ed.), *Anti-suit Injunctions in International Arbitration, IAI Seminar (Paris – November 21, 2003)* (New York/Bern, 2005).
- Levy Nicholas and O'Donoghue Robert**, "The EU Leniency Programme Comes of Age", 27 *World Competition* 75 (2004).
- Lew D.M. Julian**, "EEC Law Restriction on Arbitration", 47 *Arb.* 117 (1981-82).
- Lew D.M. Julian**, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction", in: Lew (Ed.), *Contemporary Problems in International Arbitration* (London, 1986).
- Lew D.M. Julian, Mistelis A. Loukas and Kröll M. Stefan**, *Comparative International Commercial Arbitration* (The Hague/London/New York, 2003).
- Liakopoulos Thanasis**, "The Question of Private International Law in the Control of Concentrations", in: *The Control of Concentrations of Undertakings in Competition Law* (Athens, 1998) [in Greek].
- Liakopoulos Thanasis**, *Industrial Property* (Athens, 2000) [in Greek].
- Libertini Mario**, "Autonomia privata e concorrenza nel diritto italiano", 100 *Riv.Dir.Comm.* 433 (2002).
- Libertini Mario**, "Ancora sui rimedi civili conseguenti a violazioni di norme antitrust", 10 *Danno e Responsabilità* 933 (2004).
- Libertini Mario**, "Ancora sui rimedi civili conseguenti ad illeciti antitrust (II)", 11 *Danno e Responsabilità* 237 (2005).
- Lieberknecht Otfried**, "Das Verhältnis der EWG-Gruppenfreistellungsverordnungen zum deutschen Kartellrecht", in: Freiherr von Gramm, Raisch & Tiedemann (Eds.), *Strafrecht, Unternehmensrecht, Anwaltsrecht, Festschrift für Gerd Pfeiffer* (Köln/Berlin/Bonn/München, 1988).
- Liebscher Christoph**, "European Public Policy after *Eco Swiss*", 10 *Am.Rev.Int'l Arb.* 81 (1999).
- Liebscher Christoph**, "European Public Policy: A Black Box?", 17(3) *JInt'l Arb* 73 (2000).
- Liebscher Christoph**, *The Healthy Award, Challenge in International Commercial Arbitration* (The Hague/London/New York, 2003).
- Ligustro Aldo**, "Italie", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. I, *United Kingdom and Italy* (Baden-Baden, 1992).
- Lindsay Alistair**, *The EC Merger Regulation: Substantive Issues* (London, 2003).
- Lomholt Fin**, "The 1984 IBM Undertaking: Commission's Monitoring and Practical Effects", (1998-3) *EC Competition Policy Newsletter* 7.
- Louis Jean-Victor**, "Ensuring Compliance and Implementation by Member States", in: Buxbaum, Hertig, Hirsch & Hopt (Eds.), *European Economic and Business Law, Legal and Economic Analyses on Integration and Harmonization* (Berlin/New York, 1996).

Louis Jean-Victor and Ronse Thierry, *L'ordre juridique de l'Union européenne* (Bruxelles/Paris, 2005).

Lowe Philip, "Facing New Challenges for EU Competition Policy", in: *The European Antitrust Review 2004, Global Competition Review Special Report* (London, 2003).

Lowe Philip, "Recent Reforms and Future Projects for the Enforcement of the EU Anti-trust System", Speech Made at the Annual Conference of the Spanish Antitrust Court", July 8th 2003, in: <http://europa.eu.int/comm/competition/speeches>.

Lowe Philip, "Meeting the Challenge of Modernisation", Speech Made at the Oxford Competition Policy Conference, July 15th and 16th 2003, in: <http://europa.eu.int/comm/competition/speeches>.

Lowe Philip, "European Competition Rules: The New Enforcement System for Articles 81 and 82 EC Is soon to Be Reality", Article for KANGAROO Group Newsletter, September 2003, in: <http://europa.eu.int/comm/competition/speeches>.

Loÿ Odette, "L'application en France du droit communautaire de la concurrence", 16 RTDE 438 (1980).

Lübking Johannes, "Enforcing Commitments under the ECMR through Arbitration – Is it still Arbitration?", IBC Conference on Alternative Dispute Resolution and Competition (1 March 2005, London).

Lucas de Leyssac Claude and Parleani Gilbert, *Droit du marché* (Paris, 2002).

MacCulloch Angus, "Private Enforcement of the Competition Act Prohibitions", in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000).

Mackenzie-Stuart Alexander John, "Arbitration and the Court of Justice of the European Communities", 4(1) ICC Bull. 51 (1993).

Maffei Paul, "Judicial Review in Competition Cases", in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD (Paris, 1997).

Magnusson Annette, "A Note on General Principles of Arbitration in Sweden", 2/2004 *Stockholm Arbitration Newsletter* 1.

Maher Imelda, "Ireland", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. II, *Benelux and Ireland* (Baden-Baden, 1994).

Maher Imelda, *Competition Law: Alignment and Reform* (Dublin, 1999).

Maher Imelda, "Re-imagining the Story of European Competition Law", 20 OJLS 155 (2000).

Mail-Fouilleul Stéphane, *Les sanctions de la violation du droit communautaire de la concurrence* (Paris, 2002).

Mailänder K. Peter, *Zuständigkeit und Entscheidungsfreiheit nationaler Gerichte im EWG-Kartellrecht* (Baden-Baden, 1965).

Maitland-Walker H. Julian, "Editorial: A Step Closer to a Definitive Ruling on a Right in Damages for Breach of the EC Competition Rules", 13 ECLR 3 (1992).

Maitz-Strassnig Huberta, "Rapport autrichien", in: *XVIII congrès FIDE* (Stockholm, 3-6 juin 1998), Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).

Malferrari Luigi, "Neues zur Kompetenzverteilung zwischen Kommission und nationaler Gerichtsbarkeit auf dem Gebiet des Wettbewerbs und zum Verhältnis zwischen der Nichtigkeitsklage und dem Vorabentscheidungsverfahren: Anmerkungen zum Urteil des EuGH in der Rechtssache *Masterfoods*", 36 EuR 605 (2001).

Mantilla-Serrano Fernando, "The New Spanish Arbitration Act", 21 JInt'l Arb. 367 (2004).

Marenco Giuliano, "The Uneasy Enforcement of Article 85 EEC as between Community and National Levels", in: Hawk (Ed.), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute* (New York/Deventer, 1994).

Marenco Giuliano, "Consistent Application of EC Competition Law in a System of Parallel Competencies", in: *Conference on the Reform of European Competition Law in Freiburg i. B.* (9 and 10 November 2000), [http://europa.eu.int/comm/competition/antitrust/others/speech_marenco .pdf](http://europa.eu.int/comm/competition/antitrust/others/speech_marenco.pdf).

Marenco Giuliano, "Le régime de l'exception légale et sa compatibilité avec le Traité", 37 CDE 135 (2001).

Marenco Giuliano, "Does a Legal Exception System Require an Amendment of the Treaty?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Markert Kurt, "Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC", 11 CMLRev. 92 (1974).

Marrella Fabrizio, "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts", 36 Vand.JTransnat'l 1137 (2003).

Marsden B. Philip, "Inducing Member State Enforcement of European Competition Law: A Competition Policy Approach to 'Antitrust Federalism'", 18 ECLR 234 (1997).

Marsden B. Philip and Smith Charles, "United Kingdom", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004).

Martinez Lage Santiago, "Editorial: ¿Próximo big bang en el derecho comunitario de la competencia?", (2000-11/12) GJ 3.

Martinez Lage Santiago and Brokelmann Helmut, "Article 81(3) before National Courts: The CAMPSA Doctrine of the Spanish Supreme Court and Articles 84 and 85 Revisited", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Martinez Lage Santiago, "Editorial: Cambio de cultura: Aprobada, al fin, la reforma de las normas de aplicación de los artículos 81 y 82 CE (I y II)", (2003-1/2) GJ 3 + (2003-3/4) GJ 3.

Mastroianni Roberto, "Osservazioni in merito alla effettività del sistema italiano di tutela 'decentrata' del diritto comunitario della concorrenza", 6 Dir.Un.Eur. 78 (2001).

Mastroianni Roberto, "La tutela dei privati nel sistema italiano di applicazione 'decentrata' del diritto comunitario della concorrenza", in: Cartei & Vannucci (Eds.), *Diritto comunitario e ordinamento nazionale* (Milano, 2003).

Mavroidis C. Petros and Neven J. Damien, "The White Paper: A Whiter Shade of Pale of Interests, and Interests", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Mavroidis C. Petros and Neven J. Damien, "Bronner Kebab: Beyond Refusal to Deal and Duty to Cooperate", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?* (Oxford/Portland, 2006).

McClellan Anthony, "Commercial Arbitration and European Community Law", 5 Arb.Int'l 68 (1989).

McCullough T. Joseph, IV, "The Continuing Search for Greater Certainty: Suggestions for Improving US and EEC Antitrust Clearance Procedures", 6 Nw.JInt'l & Bus. 803 (1984).

McCurdy V.S. Gregory, "The Impact of Modernisation of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective", 25 ECLR 509 (2004).

Meade John, "Decentralisation in the Implementation of EEC Competition Law - A Challenge for the Lawyers", 37 NILQ 101 (1986).

Mederer Wolfgang, "Remedies in Merger Cases", Speech Delivered at the Fifth Annual Competition Conference, IBA (Fiesole/Florence, 21 September 2001), in: <http://europa.eu.int/comm/competition/speeches>.

- Mehdi Rostane, "Le revirement jurisprudentiel en droit communautaire", in: *L'intégration européenne au XXI^e siècle, En hommage à Jacques Bourrinet* (Paris, 2004).
- Meli Marisa, "Il progetto di modernizzazione del sistema di controllo delle intese anticoncorrenziali ed il ruolo del giudice ordinario", 4 Eur. & Dir.Priv. 117 (2002).
- Mengozzi Paolo, "La giurisprudenza del Tribunale delle Comunità europee in materia di concorrenza e l'applicazione da parte dei giudici nazionali del regolamento del Consiglio n. 1/2003", 8 Contr. & Impr. (Eur.) 210 (2003).
- Mertikopoulou Victoria, "The Shift of the Treatment of Cartel Participants Infringing Article 81 EC and the Recent Tendencies of the Fining Policy of the European Commission", 9 *Dikaio Epicheiriseon kai Etairion* 43 (2003) [in Greek].
- Mestmäcker Ernst-Joachim, "Versuch einer kartellpolitischen Wende in der EU", 10 EuZW 523 (1999).
- Mestmäcker Ernst-Joachim, "Begrenzt abschreckend", Kommentar, 50(7-8) WuW (2000).
- Mestmäcker Ernst-Joachim, "The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order", 1 EBOR 401 (2000).
- Mestmäcker Ernst-Joachim, "The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Metaxas Antonis, "Public Procurement Contracts and Community Law: The Interrelationship between National and Community Regulatory Framework and the Relevant Case Law of the ECJ", 48 *Epitheorissi Dimosiou Dikaïou kai Dioikitikou Dikaïou* 441 (2004) [in Greek].
- Metaxas Antonis, *State Liability for Violations of Community Law by National Supreme Court Judgments* (Athens/Thessaloniki, 2005) [in Greek].
- Michaels Ralf, "Anerkennung internationaler Schiedssprüche und ordre public", 40 RfRV 5 (1999).
- Middleton G. Kirsty, "Harmonisation with Community Law: The Euro Clause", in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000).
- Middleton G. Kirsty, "The Americanisation of UK Competition Law", 8 *Scottish Law and Practice Quarterly* 27 (2003).
- Middleton G. Kirsty, "Modernization of European Community Competition Law Enforcement for the Twenty-first Century", in: *Humanizing our Global Order, Essays in Honour of Ivan Head* (Toronto, 2003).
- Miram Frank, "Die dezentrale Anwendung durch das Bundeskartellamt: Länderbericht Deutschland", in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001).
- Misra Joyiyoti and Jordans Roman, "Confidentiality in International Arbitration: An Introspection of the Public Interest Exception", 23 *JInt'l Arb.* 39 (2006).
- Mistelis A. Loukas, "Confidentiality and Third Party Participation: *UPS v. Canada* and *Methanex Corporation v. United States*", 21 *Arb.Int* 211 (2005).
- Moavero Milanese Enzo, "Spunti intorno all'idea di un'autorità indipendente comunitaria per la tutela della concorrenza", 2 Contr. & Impr. (Eur.) 543 (1997).
- Moch Christiane, "Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven", 56 WuW 39 (2006).
- Moitinho de Almeida José Carlos, "La notion de juridiction d'un État-membre (article 177 du Traité CE)", in: Rodríguez Iglesias, Due et al. (Eds.), *Mélanges en hommage à Fernand Schockweiler* (Baden-Baden, 1999).

Montag Frank, "The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View", in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999).

Montag Frank, "The System of Legal Exception", 37 CDE 145 (2001).

Montag Frank and Rosenfeld Andreas, "A Solution to the Problems? Regulation 1/2003 and the Modernisation of Competition Procedure", 1 ZWeR 107 (2003).

Montag Frank and Janssens Thomas, "Article 81(3) in the Context of Modernisation – A Lawyer's View", in: Geradin (Ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerp/Oxford, 2004).

Montag Frank and Cameron Stephanie, "Effective Enforcement: The Practitioner's View of Recent Experiences under Regulation 1/2003", Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005).

Monti Mario, "Guest Editorial: A European Competition Policy for Today and Tomorrow", 23(2) *World Competition* 1 (2000).

Monti Mario, "Modernisation of EU Competition Rules", Speech Made at the Launch of the Competition Act 1998, London, March 2nd 2000, in: http://europa.eu.int/comm/competition/speeches/index_2000.html.

Monti Mario, "Competition Law Reform", Speech Made at the CBI Conference on Competition Law Reform, London, June 12th 2000, in: <http://europa.eu.int/comm/competition/speeches>.

Monti Mario, "Opening Statement: The Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Monti Mario, "Priorities for EU Competition Policy", in: Hellenic Competition Committee (Ed.), *EU Competition Law and Policy, Developments and Priorities, Athens Conference, April 19th 2002* (Athens, 2002).

Monti Mario, "Les réformes en cours en matière de concurrence : Mise en perspective", Speech Made at the Cercle Fédéraliste Européen, Brussels, November 22nd 2002, in: <http://europa.eu.int/comm/competition/speeches>.

Monti Mario, "Opening Speech: Effective Private Enforcement of EC Antitrust Law", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001 Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).

Monti Mario, "EU Competition Policy after May 2004", Speech Delivered at the Fordham Annual Conference on International Antitrust Law and Policy (New York, 24 October 2003), in: <http://europa.eu.int/comm/competition/speeches>.

Monti Mario, "The EU Gets New Competition Powers for the 21st Century", in: *Competition Policy Newsletter, Special Edition 2004*.

Monti Mario, "A Reformed Competition Policy: Achievements and Challenges for the Future", Speech Delivered at the Center for European Reform (Brussels, 28 October 2004), in: <http://europa.eu.int/comm/competition/speeches>.

Möschel Wernhard, "Systemwechsel im Europäischen Wettbewerbsrecht?", 55 JZ 61 (2000).

Möschel Wernhard, "Guest Editorial: Change of Policy in European Competition Law?", 37 CMLRev. 495 (2000).

Möschel Wernhard, "Effizienter Wettbewerbsschutz in einer erweiterten Gemeinschaft durch Einbeziehung der nationalen Wettbewerbsbehörden und nationalen Gerichte?", 51 WuW 147 (2001).

- Mottard Yves, Partsch Philippe-Emmanuel, Pittie Marc and Struys L. Michel, "Chronique semestrielle de droit communautaire", 120 JdT (2001) 809.
- Mourre Alexis, "Granting Interim Relief Measures: Order or Award?", Paper Presented at 8th IBA International Arbitration Day Conference (Geneva, 18 March 2005).
- Müller Christoph, "La confidentialité en arbitrage commercial international : Un trompe-l'œil ?", 23 Bull. ASA 216 (2005).
- Müller Peter, *Punitive Damages und deutsches Schadensersatzrecht* (Berlin/New York, 2000).
- Müller-Tautphaeus Ken, "Das Weissbuch der Kommission zur Modernisierung der Anwendungsregeln zu Art. 81, 82 EGV: Der Gegenwärtige Diskussionsstand", 72 SZWR/RSDA 149 (2000).
- Munari Francesco, "La Legge 10 Ottobre 1990 n. 287 e il diritto comunitario della concorrenza", 8 Contr. & Impr. 602 (1992).
- Munari Francesco, "Ambito di applicazione e rapporti con l'ordinamento comunitario", in: Afferni (Ed.), *Concorrenza e mercato, Commento alla Legge 10 ottobre 1990 n. 287 e al Decreto 25 gennaio 1992 n. 74* (Padova, 1994).
- Musger Gottfried, "Taking of Evidence", in: Council of the European Union (Ed.), *Civil Law, European Judicial Cooperation 2004* (Luxembourg, 2005).
- Navarro Varona Edurne and Rating Stefan, "Spain", in: Behrens (Ed.), *EC Competition Rules in National Courts, Vol. V, Spain, Portugal and Greece* (Baden-Baden, 2000).
- Navarro Varona Edurne, Font Galarza Andrés, Folguera Crespo Jaime and Briones Alonso Juan, *Merger Control in the European Union, Law, Economics and Practice* (Oxford, 2005).
- Nazzini Renato, *Concurrent Proceedings in Competition Law, Procedure, Evidence and Remedies* (Oxford, 2004).
- Nazzini Renato and Andenas Mads, "Awarding Damages for Breach of Competition Law in English Courts – *Crehan* in the Court of Appeal", 17 EBLR 1191 (2006).
- Nehl Hans Peter, "Changes in Legislation: Constitutional Reform and the Role of the Administrator", in: *The Modernisation of EC Competition Law: The Next Ten Years*, CELS Occasional Paper, No. 4 (Cambridge, 2000).
- Nehl Hanns Peter and Nuijten Jan, "Commission Ends Competition Proceedings Regarding German Book Price Fixing Agreements Following Acceptance of an Undertaking on Cross-border Sales", (2002-2) *EC Competition Policy Newsletter* 35.
- Nesbitt Simon and Quinlan Henry, "The Status and Operation of Unilateral or Optional Arbitration Clauses", 22 Arb.Int'l 133 (2006).
- Nettesheim Martin, "Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht", 45 DÖV 999 (1992).
- Niboyet Marie-Laure, "La réception du droit communautaire en droit judiciaire interne et international", in: Bergé & Niboyet (Eds.), *La réception du droit communautaire en droit privé des États membres* (Bruxelles, 2003).
- Nikpay Ali and Faull M.H. Jonathan, "Article 81", in: Faull & Nikpay (Eds.), *The EC Law of Competition* (Oxford, 1999).
- Nisser Carl and Blanke Gordon, "Reflections on the Role of the European Commission as *amicus curiae* in International Arbitration Proceedings", 27 ECLR 174 (2006).
- Nivarra Luca, "Il 'libro bianco sulla modernizzazione delle norme per l'applicazione degli articoli 85 e 86 del Trattato CE': Quale futuro per il diritto europeo della concorrenza?", 3 Eur. & Dir.Priv. 1001 (2000).
- Noirfalisse Catherine, "La Belgique", in: Behrens (Ed.), *EEC Competition Rules in National Courts, Vol. II, Benelux and Ireland* (Baden-Baden, 1994).

Norberg Sven, "The Complementarity of Community Remedies and of National Remedies (Such as Damages Available in Competition Cases in National Courts when a Community Institution has Determined a Violation of the Competition Provisions in the Treaty of Rome", in: Sundström & Kauppi (Eds.), *Access to Justice, A Record of Thoughts and Ideas Dealing with the Interrelationship between National Law and Courts and Community Law and Courts, The Nordic Conference on the European Union: Access to Justice, the Rule of Law and Due Process 6-8 November 1998* (Helsinki, 1999).

Norberg Sven, "Competition Policy of the European Commission: In the Interest of Consumers?", Speech Made at Leuven, June 20th 2003, in: <http://europa.eu.int/comm/competition/speeches>.

Nordlander Kristina, "Discovering Discovery – US Discovery of EC Leniency Statements", 25 ECLR 646 (2004).

Nouvel Laurent, "1er mai 2004 : L'entrée en vigueur du règlement 1/2003 et du 'paquet modernisation' portant réforme des règles de mise en œuvre des articles 81 et 82 CE", (2004) RDAI/IBLJ 371.

Nowak Carsten, *Konkurrentenschutz in der EG, Interdependenz des gemeinschaftsrechtlichen und mitgliedstaatlichen Rechtsschutzes von Konkurrenten* (Baden-Baden, 1997).

Nowak Carsten, "Das Verhältnis des Wettbewerbsrechts und der Grundfreiheiten im Binnenmarkt", in: Hatje & Terhechte (Eds.), *Das Binnenmarktziel in der Europäischen Verfassung* (Baden-Baden, 2004).

Odudu Okeoghene, "Article 81(3), Discretion and Direct Effect", 23 ECLR 17 (2002).

Odudu Okeoghene, *The Boundaries of EC Competition Law, The Scope of Article 81* (Oxford, 2006).

Oglio Livia, "Italy", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003).

O'Keeffe Siun, "First among Equals: The Commission and the National Courts as Enforcers of EC Competition Law", 26 ELRev. 301 (2001).

Oliver Peter, "Les quatre libertés et les droits fondamentaux", in: Vandersanden & de Walsche (Eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. I (Bruxelles, 2003).

Oliver Peter, "Competition and Free Movement: Their Place in the Treaty", in: Tridimas & Nebbia (Eds.), *European Union Law in the Twenty-First Century, Rethinking the New Legal Order*, Vol. II, *Internal Market and Free Movement Community Policies* (Oxford/Portland, 2004).

Ortiz Blanco Luis, *European Community Competition Procedure* (Oxford, 1996).

Ottervanger R. Tom, Steenbergen Jacques and Van der Voorde J. Sander, *Competition Law of the European Union, the Netherlands and Belgium* (The Hague/London/Boston, 1998).

Pace Lorenzo Federico, "La politica di decentramento del diritto antitrust CE come principio organizzatore del regolamento 1/2003: Luci ed ombre del nuovo regolamento di applicazione degli artt. 81 e 82 TCE", 14 Riv.It.Dir.Publ.Com. 147 (2004).

Pallek Markus, "L'avenir de la coopération euro-américaine dans le domaine de la concurrence", 40 CDE 95 (2004).

Palmieri Nicola Walter, "Tribunale mondiale antitrust a Washington?", 3-4 Int'lLis (Autunno 2003) 140.

Pampel Gunnar, "Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht", 16 EuZW 11 (2005).

Panagopoulos George, "Substance and Procedure in Private International Law", 1 JPIL 69 (2005).

- Panagopoulos D. Konstantinos**, "Punitive Damages and Greek Public Policy (or towards a Reevaluation of the Objectives of Civil Liability)", 2000(2) *Kritiki Epitheorisi* 195[in Greek].
- Pappalardo Aurelio**, "Les principales orientations actuelles de la politique communautaire en matière de concurrence", 119 *JdT* 488 (2000).
- Parlasca Susanne**, "Should the Competition Authorities Be Authorized to Intervene in Competition Related Problems, Particularly when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Germany", LIDC Questions 2001/2002, in: <http://www.ligue.org>.
- Parret Laura**, "Judicial Protection after Modernisation of Competition Law", 32 *LIEI* 339 (2005).
- Paulis Emil**, "Decentralisation of Enforcement of Community Law - Working Paper VII", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1996* (The Hague/Boston/London, 1997).
- Paulis Emil**, "Coherent Application of EC Competition Rules in a System of Parallel Competencies", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Paulis Emil**, "Latest Commission Thinking and Progress on the Modernisation of Regulation 17", in: *European Competition Law: A New Role for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers* (Bruxelles, 2001).
- Paulis Emil and Gauer Céline**, "La réforme des règles d'application des articles 81 et 82 du Traité", 11 *JdT* (Eur.) 65 (2003).
- Paulweber Michael and Kögel Rainer**, "Das europäische Wettbewerbsrecht am Schweißweg: Die Reformvorhaben der Kommission zur Modernisierung des europäischen Kartellverfahrensrechts in der Kritik", 44 *AG* 500 (1999).
- Paulweber Michael**, "The End of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law", 23(2) *World Competition* 3 (2000).
- Pavlopoulos B. Prokope**, *Guarantees of the Judicial Protection in European Community Law* (Athens/Komotini, 1993) [in Greek].
- Peeperkorn Luc**, "New Notice on Agreements of Minor Importance (*De Minimis* Notice)", (2002-1) *EC Competition Policy Newsletter* 45.
- Peeperkorn Luc**, "Revision of the 1997 Notice on Agreements of Minor Importance (*De Minimis* Notice)", (2001-2) *EC Competition Policy Newsletter* 4.
- Pera Alberto**, *Concorrenza e antitrust* (Bologna, 2001).
- Peretz George**, "Should Competition Authorities Be Authorized to Intervene in National Competition Proceedings, Especially in the Courts? If they Should, then in what Circumstances and to What Extent Should this Be the Case? National Report from the United Kingdom", LIDC Questions 2001/2002, in: <http://www.ligue.org>.
- Petsche Alexander and Rinne Alexander**, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003).
- Pignataro Laura**, "La riforma del diritto comunitario della concorrenza: Il regolamento n. 1/2003 sull'applicazione degli articoli 81 e 82 del Trattato CE", 8 *Contr. & Impr.* (Eur.) 233 (2003).
- Pirrung Marc**, "EU Enlargement towards Cartel Paradise? An Economic Analysis of the Reform of European Competition Law", 1 *Erasmus Law and Economics Review* 77 (2004).
- Pittie Marc and Van Ypersele Patrick**, "Contentieux communautaire", 12 *JdT* (Eur.) 236 (2004).
- Pizzicaroli Maurizio Emanuele**, "L'applicazione della disciplina comunitaria della concorrenza da parte dell'Autorità garante del mercato in Italia", 40 *Dir.Com.* 601 (2001).

Platteau Koen, "Competition Law in Belgium", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. 1, EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland (The Hague/Deventer, 2000).

Plompen M.A.L. Peter, "Efficient Protection of Competition in an Enlarged Community through Full Association of National Competition Authorities and National Courts", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_plompen.pdf.

Plompen M.A.L. Peter, "Modernising EU Competition Policy: The Point of View of Undertakings", in: Pérez van Kappel (Ed.), *Decentralised Application of EC Competition Law: National Experience and Reform* (Köln, 2001).

Poillot-Peruzzetto Sylvaine and Luby Monique, *Le droit communautaire appliqué à l'entreprise* (Paris, 1998).

Poillot-Peruzzetto Sylvaine, "L'ordre public international en droit communautaire : À propos de l'arrêt de la Cour de justice des Communautés du 1er juin 1999 (*affaire Eco Swiss China Time Ltd.*)", 127 JDI (*Chunet*) 299 (2000).

Poillot-Peruzzetto Sylvaine, "Mise en œuvre des articles 81 et 82 sur le fondement du règlement n° 1/2003", 14(6) Contr.Conc.Consomm. 29 (2004).

Poillot-Peruzzetto Sylvaine, "Concurrence et constitution", 15(5) Contr.Conc.Consomm. 3 (2005).

Pons Jean-François, "Nouveaux enjeux et réformes de la politique européenne de la concurrence", *Petites Affiches*, 5-11-2001, No. 220, 21.

Poudret Jean-François and Besson Sébastien, *Droit comparé de l'arbitrage international* (Zurich/Bâle/Genève, 2002).

Power Vincent, "Representing Clients after the Modernisation of EC Competition Law", 14 ICCLR 335 (2003).

Prechal Sacha, "Community Law in National Courts: The Lessons from *Van Schijndel*", 35 CMLRev. 681 (1998).

Prechal Sacha, *Directives in European Community Law* (Oxford, 2005).

Prieto Catherine and Roda Jean-Christophe, "Quelles évolutions pour la clémence dans l'Union européenne ?", 3/2005 *Concurrences* 12.

Putman Emmanuel, *Contentieux économique* (Paris, 1998).

Racine Jean-Baptiste, *L'arbitrage commercial international et l'ordre public* (Paris, 1999).

Raclet Arnaud, *Droit communautaire des affaires et prérogatives de puissance publique nationales* (Paris, 2002).

Radermacher Ludger, "Gemeinschaftsrechtliche Staatshaftung für höchstrichterliche Entscheidungen", 23 NVwZ 1415 (2004).

Radicati di Brozolo G. Luca, "Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali", 9 Riv.Arbitrato 665 (1999).

Radicati di Brozolo G. Luca, "Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the 'Second Look'", 7 Int.ALR 23 (2004).

Randolph Fergus and Robertson Aidan, "The First Claims for Damages in the Competition Appeal Tribunal", 26 ECLR 365 (2005).

Ratliff John, "Major Events and Policy Issues in EC Competition Law, 2000 - Part 2", 12 ICCLR 67 (2001).

Rayment Ben, "Practice and Procedure before the Competition Appeal Tribunal", in: Ward & Smith (Eds.), *Competition Litigation in the UK* (London, 2005).

Rehbinder Eckard, "Der Vorrang des EG-Kartellrechts vor nationalem Kartellrecht bei Freistellungen: Dogmatische Konstruktion, Sachargumente und politische Interessen", in:

Immenga, Möschel & Reuter (Eds.), *Festschrift für Ernst-Joachim Mestmäcker zum 70. Geburtstag* (Baden-Baden, 1996).

Reidlinger Axel and Thalhammer Dieter, "Austria", in: *Modernisation in Europe 2005, Global Competition Review Special Report* (London, 2005).

Reiner Andreas, "Zur Vollstreckung eines Schiedsspruchs nach dem Europäischen Übereinkommen von 1961 trotz Aufhebung im Ursprungsland und zum Umfang der ordre public-Kontrolle nach Artt. 81, 82 EGV", 20 IPRax 323 (2000).

Remien Oliver, "Europäisches Privatrecht als Verfassungsfrage", 40 EuR 699 (2005).

Rey Patrick, "Les enjeux de la réforme : Le point de vue d'un économiste", (2001-7/8) Rev.Conc.Consomm. 11.

Reynolds J. Michael, "From Co-operation to Integration: The Relationship between National and European Competition Law through Judicial Review", in: O'Keeffe & Bavasso (Eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. I, *Judicial Review in European Union Law* (The Hague/London/Boston, 2000).

Rigaux François and Fallon Marc, *Droit international privé* (Bruxelles, 2005).

Rigozzi Antonio, *L'Art. 85 du Traité CE devant le juge civil suisse : Les contrats de distribution à l'égard de l'art. 19 LDIP et la nouvelle loi fédérale sur les cartels*, Swiss Papers on European Integration, No. 2/96 (Bern/Zürich, 1996).

Riley J. Alan, "The Draft Competition Regulation", *Focus*, [2000] 12 Euro.CL xi.

Riley J. Alan, "EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part One: Regulation I and the Notification Burden", 24 ECLR 604 (2003).

Riley J. Alan, "EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part Two: Between the Idea and the Reality: Decentralisation under Regulation I", 24 ECLR 657 (2003).

Rinaldi Raimondo, "Il regolamento del Consiglio N. 1/2003: Un primo esame delle principali novità e dei punti aperti della riforma sull'applicazione delle regole comunitarie in tema di concorrenza", 17 Dir.Comm.Int. 143 (2003).

Rinciaux Philippe, "Les autorités de la concurrence doivent-elles être autorisées à intervenir dans les procédures relatives à des problèmes de concurrence, plus particulièrement lorsqu'elles sont menées devant les juridictions ordinaires ? Dans l'affirmative, quel devrait être le fondement de leur pouvoir d'intervention ? Rapport international", LIDC Questions 2001/2002, in: <http://www.ligue.org>.

Ritter Cyril, "The New Technology Transfer Block Exemption under EC competition Law", 31 LIEI 161 (2004).

Ritter Kurt Lennart, "Automec II: Ein Beitrag des Gerichtshofs zur Subsidiarität?", in: *Schwerpunkte des Kartellrechts 1991/92, Verwaltungs- und Rechtsprechungspraxis, Referate des 20. FIW-Seminars 1992 und der 11. Brüsseler Informationstagung 1992* (Köln/Berlin/Bonn/München, 1993).

Ritter Kurt Lennart, Braun W. David and Rawlinson Francis, *European Competition Law: A Practitioner's Guide* (The Hague/London/Boston, 2000) + *Website Supplement, Update January 2003*, in: <http://www.kluwerlaw.com>.

Rittner Fritz, "Diskussionsbeitrag - Wandel des Europäischen Wettbewerbsrechts", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001).

Roach Kent and Trebilcock J. Michael, "Private Enforcement of Competition Laws", 34 *Osgoode Hall Law Review* 461 (1996).

Rocca Gianfranco, "Concorrenza: Ipotesi di creazione di un'autorità comunitaria indipendente", 2 Contr. & Impr. (Eur.) 549 (1997).

Rocca Gianfranco, "Livre blanc sur la modernisation des règles d'application des articles 81 et 82 du Traité", (1999-3) *EC Competition Policy Newsletter* 1.

Rocca Gianfranco, "L'Europa della concorrenza di fronte alle sfide del nuovo millennio: Le riforme necessarie in materia antitrust", in: Raffaelli (Ed.), *Antitrust between EC Law and National Law, Treviso 13-14 May 1999* (Bruxelles/Milano, 2000).

Rocca Gianfranco, "Sécurité juridique dans un système de compétences parallèles", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_rocca.pdf.

Rodger J. Barry and Wylie R. Stuart, "Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement", 18 ECLR 485 (1997).

Rodger J. Barry and MacCulloch Angus, "Community Competition Law Enforcement, Deregulation and Re-regulation: The Commission, National Authorities and Private Enforcement", 4 Columbia JEL 579 (1998).

Rodger J. Barry, "Interrelationship with Community Competition Law Enforcement", in: Rodger & MacCulloch (Eds.), *The UK Competition Act, A New Era for UK Competition Law* (Oxford/Portland, 2000).

Rodger J. Barry and MacCulloch Angus, *Competition Law and Policy in the European Community and United Kingdom* (London/Sidney, 2001).

Rodger J. Barry, "The Interface between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment", 6 Edin.LRev. 217 (2002).

Rodger J. Barry, "Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages?", 24 ECLR 103 (2003).

Rodriguez Iglesias Gil Carlos, "Judicial Protection of the Citizen under European Law", in: Markesinis (Ed.), *The Clifford Chance Millennium Lectures, The Coming together of the Common Law and the Civil Law* (Oxford/Portland, 2000).

Roth M. Peter (Ed.), *Bellamy & Child European Community Law of Competition* (London, 2001).

Roth M. Peter, "The New UK Competition Act - The Private Perspective", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001).

Roth Wulf-Henning, "Europäisches Kartellrecht - Terra Incognita?", 53 NJW 1313 (2000).

Roth Wulf-Henning, "Die richtlinienkonforme Auslegung", 16 EWS 385 (2005).

Rounis Georgios, *Competition or Cooperation? The Limits of Firms' Activity within the Community Area* (Athens/Komotini, 1992).

Rubino-Sammartano Mauro, "Amiable compositeur (Joint Mandate to Settle) and ex bono et aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited", 9(1) JInt'l Arb. 5 (1992).

Rubino-Sammartano Mauro, *International Arbitration Law and Practice* (The Hague/London/Boston, 2001).

Ruffert Matthias, "Rights and Remedies in European Community Law: A Comparative View", 34 CMLRev. 307 (1997).

Ruiz Nuno, "Rapport portugais", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).

Ryan Bernard, "The Private Enforcement of European Union Labour Laws", in: Kilpatrick, Novitz & Skidmore (Eds.), *The Future of Remedies in Europe* (Oxford/Portland, 2000).

Saggio Antonio, "Competenze rispettive delle autorità comunitarie e nazionali in materia di controllo e repressione delle attività anticoncorrenziali delle Imprese", 2 Dir.Un.Eur. 1 (1997).

Saggio Antonio, "La responsabilità dello Stato per violazione del diritto comunitario", 6 Danno e Responsabilità 223 (2001).

- Saint-Esteben Robert**, "La mise en œuvre de l'article 85 après l'arrêt de la Cour de justice des Communautés européennes du 6 février 1973 (aff. no. 48/72: *Brasserie de Haecht c/ consorts Wilkin, Janssen*)", 9 RTDE 270 (1973).
- Samuel Adam**, "Arbitration Statutes in England and the USA", 8 ADRLJ 2 (1999).
- Sanders Pieter**, *Quo Vadis Arbitration?, Sixty Years of Arbitration Practice, A Comparative Study* (The Hague/Boston/Dordrecht, 1999).
- Sangiovanni Valerio**, "L'applicazione in Germania della convenzione di New York sul riconoscimento e l'esecuzione dei lodi arbitrali stranieri", 41 Riv.Dir.Int.Priv.Proc. 41 (2005).
- Saria Gerhard**, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003).
- Savy Daniela**, "La leale cooperazione nella disciplina antitrust e nel nuovo regolamento CE n. 1/2003 del Consiglio", 5 Dir.Pubbl.Comp.Eur. 913 (2003).
- Schapira Jean, Le Tallec Georges, Blaise Jean-Bernard and Idot Laurence**, *Droit européen des affaires*, Vol. I (Paris, 1999).
- Schaub Alexander**, "EC Competition System: Proposals for Reform", in: Hawk (Ed.), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1999).
- Schaub Alexander and Dohms Rüdiger**, "Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag: Die Reform der Verordnung Nr. 17", 49 WuW 1055 (1999).
- Schaub Alexander**, "Modernisation of EC Competition Law: Reform of Competition No. 17", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Schaub Alexander**, "Das Europäische Kartellrecht im Jahr 2000", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Siebentes St. Galler Internationales Kartellrechtsforum 2000* (Basel/Genf/München, 2000).
- Schaub Alexander**, "The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Schaub Alexander**, "Wandel des Europäischen Wettbewerbsrechts", in: Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Wandel* (Baden-Baden, 2001).
- Schaub Alexander**, "Die Reform der Europäischen Wettbewerbspolitik", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Achtes St. Galler Internationales Kartellrechtsforum 2001* (Basel/Genf/München, 2002).
- Schaub Alexander**, "Developments of European Competition Law", in: Hellenic Competition Committee (Ed.), *EU Competition Law and Policy, Developments and Priorities, Athens Conference, April 19th 2002* (Athens, 2002).
- Schaub Alexander**, "Continued Focus on Reform: Recent Developments in EC Competition Policy", in: Hawk (Ed.), *International Antitrust Law and Policy 2001, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2002).
- Schermers G. Henry and Waelbroek F. Denis**, *Judicial Protection in the European Union* (The Hague/London/New York, 2001).
- Schinas G. Ioannis**, "The Greek Experience of the Protection of Free Competition: Basic Directions", in: Schinas (Ed.), *Protection of Free Competition, The Practice of EPA/EA* (Athens/Komotini, 1992) [in Greek].
- Schlenger Christoph and Hinrichs Ole**, in: Liebscher, Flohr & Petsche (Eds.), *Handbuch der EU-Gruppenfreistellungsverordnungen* (München/Wien, 2003).

- Schlosser F. Peter, "Arbitration and the European Public Policy", in: Briner, Derains *et al.* (Eds.), *L'Arbitrage et Le Droit Européen, Actes du Colloque International du CEPANI du 25 Avril 1997* (Bruxelles, 1997).
- Schmid U. Christoph, "Legitimacy Conditions for a European Civil Code", 8 MJ 277 (2001).
- Schmidt Karsten, in: Immenga & Mestmäcker (Eds.), *EG-Wettbewerbsrecht, Kommentar*, Vols. I + II (München, 1997).
- Schöldström Patrik, *The Arbitrator's Mandate, A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Sweden and Switzerland* (Stockholm, 1998).
- Schroeder Dirk, Deselaers Wolfgang, Federle Anne, Seeliger Daniela and Hartog Johanna, "Germany", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003).
- Schroeder Werner, "Die Auslegung des EU-Rechts", 44 JuS 180 (2004).
- Schröter Helmuth, in: Von der Groeben, Thiesing & Ehlermann (Eds.), *Kommentar zum EU-/EG-Vertrag*, Vol. 2/I, *Artikel 85-87 EGV* (Baden-Baden, 1999).
- Schröter Helmuth, "The Reform of EC Competition Policy", in: Chao, San *et al.* (Eds.), *International and Comparative Competition Laws and Policies* (The Hague/London/New York, 2001).
- Schröter Helmuth, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003).
- Schurmans Christine, "Le rôle du juge dans la mise en œuvre du droit européen de la concurrence", in: Nihoul (Ed.), *La décentralisation de l'application du droit de la concurrence, Un rôle accru pour le praticien?* (Bruxelles/Louvain-la-Neuve, 2004).
- Schütz Jörg, "Zur Änderung des Kartellverfahrens gemäß Artikel 81 EGV", 50 WuW 686 (2000).
- Schütz Jörg, "VO 1/2003", in: Müller-Henneberg, Schwartz & Hootz (Eds.), *Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht, Gemeinschaftskommentar*, 9. Lieferung (Köln/Berlin/München, 2004).
- Schütze A. Rolf, *Schiedsgericht und Schiedsverfahren* (München, 1999).
- Schwab Karl Heinz and Walter Gerhard, *Schiedsgerichtsbarkeit, Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren* (München, 2005).
- Schwartz A. Eric, "The Domain of Arbitration and Issues of Arbitrability: The View from the ICC", 9 ICSID Rev. 17 (1994).
- Schwarze Jürgen, "Die Auswirkungen des Vorrangs des Gemeinschaftsrechts auf das deutsche Kartell- und Wettbewerbsrecht", 51 JZ 57 (1996).
- Schweda Marc, "Die Bindungswirkung von Bekanntmachungen und Leitlinien der Europäischen Kommission", 54 WuW 1133 (2004).
- Scuffi Massimo, "Established Principles and New Perspectives in the Italian Antitrust Case Law", in: Raffaelli (Ed.), *Antitrust between EC Law and National Law, Treviso 16-17 May 2002* (Bruxelles/Milano, 2003).
- Scuffi Massimo, "Le sezioni specializzate di diritto industriale per cooperazione comunitaria ed applicazione decentrata delle regole di concorrenza", (2003) *Il Diritto Industriale* 213.
- Scuffi Massimo, "I riflessi ordinamentali ed organizzativi del regolamento comunitario n. 1/2003 sulla concorrenza", 21 *Il Corriere Giuridico* 123 (2004).
- Senden Linda, "Soft Law and its Implications for Institutional Balance in the EC", 1(2) *Utrecht Law Review* 79 (2005).

- Sevinga Klaas, "The Netherlands", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. II, *Benelux and Ireland* (Baden-Baden, 1994).
- Shaw Josephine, "United Kingdom", in: Behrens (Ed.), *EEC Competition Rules in National Courts*, Vol. I, *United Kingdom and Italy* (Baden-Baden, 1992).
- Shaw Josephine, "Decentralization and Law Enforcement in EC Competition Law", 15 LS 128 (1995).
- Shelkopyas Natalya, *The Application of EC Law in Arbitration Proceedings* (Groningen, 2003).
- Simon Denys, *Le système juridique communautaire* (Paris, 2001).
- Simont Lucien, "Arbitrage et droit de la concurrence - Quelques réflexions d'un arbitre", (1998) RDAI/IBLJ 547.
- Siragusa Mario, "Notifications of Agreements in the EEC - To Notify or not to Notify", in: Hawk (Ed.), *United States and Common Market Antitrust Policies 1986, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1987).
- Siragusa Mario, "Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules", in: Hawk (Ed.), *International Antitrust Law and Policy 1997, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1998).
- Siragusa Mario, "Future Competition Law - Working Paper V", in: Ehlermann & Laudati (Eds.), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Oxford, 1998).
- Siragusa Mario, "The Modernisation of EC Competition Law: Risks of Inconsistency and Forum Shopping", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Siri Michele, in: Marchetti & Ubertaini (Eds.), *Commentario breve al diritto della concorrenza, Antitrust, concorrenza sleale, pubblicità, marchi, brevetti, diritto d'autore* (Padova, 1997).
- Skandamis Nikolaos, *European Law*, Vol. I, *Institutions of the European Union*, No. 4, *Organic Constitution of the European Union* (Athens/Komotini, 2003) [in Greek].
- Skouris Vassilios, "The Proposals for the Reform of the Community System of Judicial Protection: On the Basis of the Draft Constitution of the European Union", in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in Greek].
- Skouris Vassilios, "Consequences of the Infringement of the Obligation to Apply Community Law, Attributable to National Supreme Courts", 24 RHDE 251 (2004) [in Greek].
- Slot Piet Jan, "The Enforcement of EC Competition Law in Arbitral Proceedings", 23(1) LIEI 101 (1996).
- Smith Helen, "The *Francovich* Case: State Liability and the Individual's Right to Damages", 13 ECLR 129 (1992).
- Snell Jukka, "And then there Were Two: Products and Citizens in Community Law", in: Tridimas & Nebbia (Eds.), *European Union Law in the Twenty-First Century, Rethinking the New Legal Order*, Vol. II, *Internal Market and Free Movement Community Policies* (Oxford/Portland, 2004).
- Somsen Han, "The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?", 1 YEEL 311 (2000).
- Soufleros E. Elias, *Franchising Contracts in Greek Law and in Community Competition Law* (Athens/Komotini, 1989) [in Greek].
- Spiegel Nico, *Kartellprivatrecht in der internationalen Handelsschiedsgerichtsbarkeit* (Baden-Baden, 2002).

Spiritus-Dassesse Anne, "On the Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).

Stamatis M. Kostas, "Recognition of a Foreign Judgment Awarding Punitive Damages", 51 *Nomiko Vima* 1553 (2003) [in Greek].

Stathopoulos Michael, "The Court of Justice of the European Communities and the Unification of Civil Law", 23 *RHDE* 511 (2003) [in Greek].

Steinbrück Ben, "German and English Court Orders in Support of Foreign Arbitrations", 6 *EBOR* 313 (2005).

Steindorff Ernst, "Article 85, Para. 3: No Case for Application by National Courts", 20 *CMLRev.* 125 (1983).

Steindorff Ernst, "Common Market Antitrust Law in Civil Proceedings Before National Courts and Arbitrators", in: Hawk (Ed.), *Antitrust and Trade Policy in the United States and the European Community 1985, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1986).

Steindorff Ernst, *EG-Vertrag und Privatrecht* (Baden-Baden, 1996).

Steindorff Ernst, "Aufgaben und Zuständigkeiten im europäischen Kartellverfahren", 162 *ZHR* 290 (1998).

Stevens Dallal, "The 'Comfort Letter': Old Problems, New Developments", 15 *ECLR* 81 (1994).

Stillfried Georg and Stockenhuber Peter, "Schadenersatz bei Verstoß gegen das Kartellverbot des Art 85 EG-V", 9 *WBl* 301 + 345 (1995).

Stillfried Georg and Stockenhuber Peter, "Der Entwurf einer neuen Verfahrensverordnung zum EG-Kartellrecht", 15 *WBl.* 145 (2001).

Stockmann Kurt, "EEC Competition Law and Member State Competition Laws", in: Hawk (Ed.), *North American and Common Market Antitrust and Trade Laws 1987, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1988).

Stockmann Kurt, "La réforme du droit allemand de la concurrence", (2006) *RLC* n° 6 106.

Stoffregen Katrin, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003).

Stone Peter, "The Rome II Proposal on the Law Applicable to Non-Contractual Obligations", 4 *ELF* 213 (2004).

Storme Marcel, "General Introduction", in: Storme (Ed.), *Rapprochement du droit judiciaire de l'Union européenne* (Dordrecht/Boston/London, 1994).

Stuyck Jules, "Competition Law in the EC and in the Member States", in: Due, Lutter & Schwarze (Eds.), *Festschrift für Ulrich Everling*, Vol. II (Baden-Baden, 1995).

Stuyck Jules, "The Specificity of Consumer Law in the Process of Europeanization of European Contract Law", Paper Presented at the EUI Conference on the Europeanisation of Private Law (Florence, 24-25 October 2003).

Stuyck Jules, Terryn Evelyne and Van Dyck Tom, "Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market", 43 *CMLRev.* 107 (2006).

Subiotto Romano and Amato Filippo, "The Reform of the European Competition Policy Concerning Vertical Restraints", 69 *Antitrust LJ* 147 (2001).

Sucker Michael, Guttuso Sebastiano and Gaster Jens, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003).

Sullivan Peter, "Antitrust around the World", (2000) *Antitrust Report* 30.

Sutherland D. Peter, "EEC Enforcement Policy: Recent Developments and Future Prospects", in: Hawk (Ed.), *United States and Common Market Antitrust Policies 1986, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1987).

- Sydow Gernot, "Europäisierte Verwaltungsverfahren", 45 JuS 97 (2005).
- Synodinos P. Harris, "The Application of Community Competition Rules by National Courts", 26 *Dike* 422 (1995) [in Greek].
- Synodinos P. Harris, "Aspects of Supremacy of Community Directives over National Law and Relevant Powers of National Courts", 48 *Epitheorisi Emporikou Dikaïou* 612 (1997) [in Greek].
- Tagaras N. Haris, "The Revision of the Brussels Convention by Regulation 44/2001", 52 *Nomiko Vima* 1143 (2004) [in Greek].
- Tavassi Marina and Scuffi Massimo, *Diritto processuale antitrust, Tutela giurisdizionale della concorrenza* (Milano, 1998).
- Tavassi Marina, "Il regolamento CE N. 1/2003: Verso la devoluzione di competenze in materia di concorrenza dalla Commissione europea alle autorità garanti ed ai giudici nazionali", 43 *Dir.Com.* 315 (2004).
- Taylor M. Paul, *EC and UK Competition Law and Compliance: A Practical Guide* (London, 1999).
- Temple Lang John, "EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law", in: Hawk (Ed.), *Antitrust and Trade Policies of the European Economic Community 1983, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1984).
- Temple Lang John, "Community Constitutional Law: Article 5 EEC Treaty", 27 *CMLRev.* 645 (1990).
- Temple Lang John, "European Community Antitrust Law: Innovation Markets and High Technology Industries", 20 *Fordham Int'ILJ* 717 (1997).
- Temple Lang John, "The Duties of National Authorities under Community Constitutional Law", 23 *ELRev.* 109 (1998).
- Temple Lang John, "Rapport général", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).
- Temple Lang John, "Decentralised Application of Community Competition Law", in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000).
- Temple Lang John, "The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflexions", 26 *ELRev.* 84 (2001).
- Temple Lang John, "The Implications of the Commission's Leniency Policy for National Competition Authorities", 28 *ELRev.* 430 (2003).
- Temple Lang John, "Commitment Decisions under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision", 24 *ECLR* 347 (2003).
- Temple Lang John, "European Community Competition Policy – How Far Does It Benefit Consumers?", 18 *Boletín Latinoamericano de Competencia* 128 (February 2004), in: <http://europa.eu.int/comm/competition/international/others>.
- Temple Lang John, "Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty", 27 *Ford.IntLJ* 1904 (2004).
- Temple Lang John, "European Competition Policy and Regulation: Differences, Overlaps, and Constraints", Speech Made at the 3rd Antitrust Conference Organized by Ecole des Mines de Paris (Cerna) and University of California at Berkeley School of Law (Paris, January 12th-13th, 2006).
- Tercinet Anne, *Droit européen de la concurrence, Opportunités et menaces* (Paris, 2000).
- Terhechte Jörg Philipp, "Gastkommentar: Die Reform des europäischen Kartellrechts – am Ende eines langen Weges?", 15(12) *EuZW* (2004).

- Terhechte Jörg Philipp**, "Die Rolle des Wettbewerbsrechts in der Europäischen Verfassung", in: Hatje & Terhechte (Eds.), *Das Binnenmarktziel in der Europäischen Verfassung* (Baden-Baden, 2004).
- Tesauro Giuseppe**, "Modernisation and Decentralisation of EC Competition Law", in: Rivas & Horspool (Eds.), *Modernisation and Decentralisation of EC Competition Law* (The Hague/London/Boston, 2000).
- Tesauro Giuseppe**, "The Relationship between the European Commission and the Competition Authorities of the EC Member Countries", in: Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Sechstes St. Galler Internationales Kartellrechtsforum 1999* (Basel/Genf/München, 2000).
- Tesauro Giuseppe**, "Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Tesauro Giuseppe**, "Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Theofrastous C. Theodore**, "International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-localization Debate", 31 Case WRes.JInt'lL 455 (1999).
- Tickle E. Geraldine and Tyler D. Colin**, "Community Competition Law, Recovering Damages in the English Courts: New Era? False Dawn", in: Lonbay & Biondi (Eds.), *Remedies for Breach of EC Law* (Chichester, 1997).
- Tizzano Antonio**, "L'applicazione decentrata degli articoli 85 e 86 del Trattato CE in Italia", in: Autorità garante della concorrenza e del mercato (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995).
- Tizzano Antonio**, "Intervento", in: Autorità garante della concorrenza e del mercato (Ed.), *Concorrenza e autorità antitrust, Un bilancio a 10 anni dalla Legge, Atti del convegno Roma 9-10 Ottobre 2000* (Roma, 2001).
- Todino Mario**, "Le norme comunitarie di concorrenza nei poteri dell'Autorità garante della concorrenza e del mercato", 12 Dir.Comm.Int. 751 (1998).
- Toffoletti Luca**, "Riforma del diritto antitrust comunitario: Giudizio di esenzione e diritti dei singoli", 29 *Giurisprudenza Commerciale* 417/I (2002).
- Toffoletto Alberto**, "Il risarcimento del danno", in: Toffoletto & Toffoletti (Eds.), *Antitrust: Le sanzioni* (Milano, 1996).
- Toffoletto Alberto**, *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust* (Milano, 1996).
- Toft Torben**, "Commission Renews the Exemption of United International Pictures BV", (1999-3) *EC Competition Policy Newsletter* 26.
- Topel Julia**, "Kohärenz der dezentralen Anwendung im System paralleler Kompetenzen", in: *Conference on the Reform of European Competition Law in Freiburg i. B. (9 and 10 November 2000)*, http://europa.eu.int/comm/competition/antitrust/others/speech_topel.pdf.
- Treacy Pat**, "Settlement Agreements: The European Perspective", 1 JIntell.PL&P 223 (2006).
- Tridimas Takis**, *The General Principles of EC Law* (Oxford, 1999).
- Tridimas Takis**, "Enforcing Community Rights in National Courts: Some Recent Developments", in: O'Keeffe & Bavasso (Eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol. I, *Judicial Review in European Union Law* (The Hague/London/Boston, 2000) = in: Kilpatrick, Novitz & Skidmore (Eds.), *The Future of Remedies in Europe* (Oxford/Portland, 2000).

Tridimas Takis, "Judicial Review and the Community Judicature: Towards a New European Constitutionalism?", in: Wouters & Stuyck (Eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune, Essays in Honour of Walter van Gerven* (Antwerpen/Groningen/Oxford, 2001).

Tridimas Takis, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", 40 CMLRev. 9 (2003).

Tritton Guy, Davis Richard, Edenborough Michael, Graham James, Malynicz Simon and Roughton Ashley, *Intellectual Property in Europe* (London, 2002).

Turner D.C. Jonathan, "The UK Competition Act 1998 and Private Rights", 21 EIPR 181 (1999).

Tzouganatos N. Dimitris, *Exclusive and Selective Distribution Agreements in Free and Unfair Competition Law* (Athens, 2001) [in Greek].

Ullrich Hanns, "Harmonisation within the European Union", 17 ECLR 178 (1996).

Ullrich Hanns, *Anti-unfair Competition Law and Anti-trust Law: A Continental Conundrum?*, EUI Working Paper, Law No. 2005/1.

Van Bael Ivo, "The Antitrust Settlement Practice of the EC Commission", 23 CMLRev. 61 (1986).

Van Bael Ivo, "Belgium", in: Maitland-Walker (Ed.), *Competition Laws of Europe* (London, 2003).

Van Barlingen Bertus, "The European Commission's 2002 Leniency Notice after One Year of Operation", (2003-2) *EC Competition Policy Newsletter* 16.

Van Barlingen Bertus and Barennes Marc, "The European Commission's 2002 Leniency Notice in Practice", (2005-3) *EC Competition Policy Newsletter* 6.

Van Caenegem Jettie, "The Long Arm of the US Courts: The *Empagran* Decision", in: *Liber Amicorum Jean-Pierre de Bandt* (Bruxelles, 2004).

Van den Berg Albert Jan, "Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few", in: *Arbitration in the Next Decade - Special Supplement 1999*, The ICC International Court of Arbitration Bulletin (Paris, 1999).

Van Erps Dirk, "The 'Old' Intrepreneur Standard UK Pub Leases", (1998-2) *EC Competition Policy Newsletter* 51.

Van Fleet Allan, Imus W. Neil, Johnston S. Jeffrey and Hennessee K. Karl, "Private Antitrust Actions", in: *The PLC Global Counsel Competition Law Handbook 2002/3* (London, 2002).

Van Gerven Walter, "L'Arbitrage dans le Droit Européen", 72 RDIDC 67 (1995).

Van Gerven Walter, "Toward a Coherent Constitutional System within the European Union", 2 EPL 81 (1996).

Van Gerven Walter, "Of Rights and Remedies in the Enforcement of European Community Law before National Courts: From the Communitarization of Domestic Law towards the Europeanization of Community Law", VIII(1) *Collected Courses of the Academy of European Law* 241 (1997).

Van Gerven Walter, "Of Rights, Remedies and Procedures", 37 CMLRev. 501 (2000).

Van Gerven Walter, Lever Jeremy, Larouche Pierre, *Common Law of Europe Casebooks: Tort Law* (Oxford/Portland, 2000).

Van Gerven Walter, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).

Van Gerven Walter, "Harmonisation Within and Beyond", in: Van Empel (Ed.), "From Paris to Nice", *Fifty Years of Legal Integration in Europe, International Pallas Conference, Nijmegen, May 24, 2002* (The Hague/London/New York, 2003).

- Van Gerven Walter**, "Harmonization of Private Law: Do we Need it?", 41 CMLRev. 505 (2004).
- Van Gerven Walter**, *The European Union, A Polity of States and Peoples* (Oxford/Portland, 2005).
- Van Gerven Walter**, *Bringing (Private) Laws Closer to Each Other at the European Level* (January 2005), in: http://www.law.kuleuven.ac.be/ccle/pdf/2005-01-18_WvG_Impact_courts_on_private_law.pdf.
- Van Gerven Walter**, "Private Enforcement of EC Competition Rules", Paper Presented at the International Bar Association and European Commission Conference: Antitrust Reform in Europe: A Year in Practice Brussels (9-11 March 2005).
- Van Haasteren Augustijn and Peña Castellot Miguel**, "Commission Fines Nintendo and Seven of its European Distributors for Colluding to Prevent Parallel Trade in Nintendo Products", (2003-1) *EC Competition Policy Newsletter* 50.
- Van Houtte Ben**, "A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85", 4 Nw.Jint'l IL & Bus. 497 (1982-1983).
- Van Miert Karel**, "Sviluppi e prospettive dell'applicazione decentrata del diritto della concorrenza europeo", in: Autorità garante della concorrenza e del mercato (Ed.), *La tutela della concorrenza: Regole, istituzioni e rapporti internazionali* (Roma, 1995).
- Van Miert Karel**, "European Competition Policy: A Retrospective and Prospects for the Future", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Van Oers Monique**, "The Way Ahead for the Commission's Modernisation Plans: Position of the Netherlands Competition Authority", in: *European Competition Law: A New Role for the Member States, Congress Organized on 20th and 21st November 2000 by the European Association of Lawyers* (Bruxelles, 2001).
- Van Reeken L.P. Bart and Noë B. Steven**, "Competition Law in The Netherlands", in: Vogelaar, Stuyck & Reeken (Eds.), *Competition Law in the EU, its Member States and Switzerland*, Vol. I, EC, France, Spain, Portugal, Italy, The Netherlands, Belgium and Switzerland (The Hague/Deventer, 2000).
- Vance S. Sarah**, "Judicial Application of Article 81(3): Are the Fears Justified?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Vaughan David**, "EC Competition Law in National Proceedings", in: Slyn & Pappas (Eds.), *Procedural Aspects of EC Competition Law* (Maastricht, 1995).
- Venit S. James**, "Slouching towards Bethlehem: The Rule of Reason and Notification in EEC Antitrust Law", 10 BCInt'l Comp.LRev. 17 (1987).
- Venit S. James**, "The Decentralised Application of Article 81: Italian Banks, Cohabitation, Private Enforcement and Other Issues Raised by the White Paper", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001).
- Venit S. James**, "Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", 40 CMLRev. 545 (2003).
- Venit S. James**, "Private Practice in the Wake of the Commission's Modernization Program", 32 LIEI 147 (2005).
- Ver Loren van Themaat Pieter, Adema N.W., Rijnsberger F., Schutte J.F. and Sevinga Klaas**, "Rapport Néerlandais", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).
- Verbist W. Herman**, "The Application of European Community Law in ICC Arbitrations, Presentation of Arbitral Awards", in: *International Commercial Arbitration in Europe - Special Supplement 1994*, The International Court of Arbitration Bulletin (Paris, 1994).

- Verouden Vincent, "Vertical Agreements and Article 81(3) EC: The Evolving Role of Economic Analysis", 71 *Antitrust LJ* 525 (2003).
- Verstrynge Jean-François, "Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy", in: Hawk (Ed.), *Antitrust and Trade Policies in International Trade 1984, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1985).
- Vesterdorf Bo, "Le relevé d'office par le juge communautaire", in: Colneric, Edward *et al.* (Eds.), *Une Communauté de droit, Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, 2003).
- Viennois Jean-Pierre, "Clarification du champ d'application du droit communautaire de la concurrence: Brèves observations sur la communication de la Commission européenne relative à la notion d'affectation du commerce figurant aux articles 81 et 82 du Traité", *Petites Affiches*, 22-9-2004, No. 190, 9.
- Vilaras K. Michael, *Community Judge and Effective Judicial Protection of Individuals* (Athens/Thessaloniki, 2003) [in Greek].
- Vilaras K. Michael, "Judicial Protection of Individuals", in: Frangakis (Ed.), *The Court of Justice of the European Communities after 50 Years of Operation* (Athens/Komotini, 2004) [in Greek].
- Virgo Graham, "The Effect of Illegality on Claims for Restitution in English Law", in: Swadling (Ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* (London, 1997).
- Visser t'Hooft W., "Japanese Law and the Unilateral Termination of Distribution Agreements: A Comparison with Dutch Law", in: Grosheide & Boele-Woelki (Eds.), *Europees Privaatrecht 1995* (Lelystad, 1995).
- Vogel Louis, *Droit de la concurrence*, Vol. II, *Procédure de concurrence, Concentrations* (Paris, 2005).
- Vogelaar Floris, "Modernisation of EC Competition Law, Economy and Horizontal Cooperation between Undertakings", 37 *Intereconomics* 19 (2002).
- Voillemont Dominique, *Gérer la clémence* (Paris/Bruxelles, 2005).
- Von Bogdandy Armin, "Legal Equality, Legal Certainty and Subsidiarity in Transnational Economic Law - Decentralized Application of Art. 81.3 EC and WTO Law: Why and why not", in: Von Bogdandy, Mavroidis & Mény (Eds.), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague/London/New York, 2002).
- Von Meibom Wolfgang and Zinsmeister Ute, "Verbesserung der europäischen Wettbewerbs-verfahren", in: *Schwerpunkte des Kartellrechts 1991/92, Verwaltungs- und Rechtsprechungs-praxis, Referate des 20. FIW-Seminars 1992 und der 11. Brüsseler Informationstagung 1992* (Köln/Berlin/Bonn/München, 1993).
- Von Winterfeld Achim, "Zum Schutzzweck des Art. 81 EG-Vertrag und zu den Rechtsfolgen eines Verstoßes nach nationalem deutschen Recht", in: Bradner, Hagen & Stürmer (Eds.), *Festschrift für Karlmann Geiß zum 65. Geburtstag* (Köln/Berlin/Bonn/München, 2000).
- Von Zumbusch Ludwig, "Arbitrability of Antitrust Claims under US, German and EEC Law: The 'International Transaction' Criterion and Public Policy", 22 *Tex.Int'l LJ* 291 (1987).
- Waelbroeck F. Denis, "New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?", 11 *ELRev.* 268 (1986).
- Waelbroeck Michel, "Antitrust Analysis under Article 85(1) and Article 85(3)", in: Hawk (Ed.), *North American and Common Market Antitrust and Trade Laws 1987, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 1988).

- Waelbroeck Michel and Frignani Aldo**, *European Competition Law (Vol. IV of the J. Mégret Commentary)* (Arsdley, 1999).
- Wahl Nils**, "Rapport suédois", in: *XVIII congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence* (Stockholm, 1999).
- Walz Robert**, *Der Vorrang des europäischen vor dem nationalen Kartellrecht* (Baden-Baden, 1994).
- Walz Robert**, "Rethinking *Walt Wilhelm*, or the Supremacy of Community Competition Law over National Law", 21 *ELRev.* 449 (1996).
- Wattel J. Peter**, "*Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This*", 41 *CMLRev.* 177 (2004).
- Weatherill Stephen**, "Public Interest Litigation in EC Competition Law", in: Micklitz & Reich (Eds.), *Public Interest Litigation Before European Courts* (Baden-Baden, 1996).
- Weatherill Stephen**, *Cases and Materials on EU Law* (Oxford, 2003).
- Weatherill Stephen**, "European Contract Law: Taking the Heat out of Questions of Competence", 15 *EBLR* 23 (2004).
- Weatherill Stephen**, *EU Consumer Law and Policy* (Cheltenham/Northampton, 2005).
- Webster H. Thomas**, "Obtaining Evidence from Third Parties in International Arbitration", 17 *Arb.Int'l* 143 (2001).
- Weigand Frank-Bernd**, "Evading EC Competition Law by Resorting to Arbitration?", 9 *Arb.Int'l* 249 (1993).
- Weiler H.H. Joseph**, "The Community System: The Dual Character of Supranationalism", 1 *YEL* 267 (1981).
- Weiler H.H. Joseph**, *The Constitution of Europe, 'Do the New Clothes have an Emperor?' and Other Essays on European Integration* (Cambridge, 1999).
- Werner Jacques**, "Application of Competition Laws by Arbitrators: The Step Too Far", 12(1) *JInt'l Arb* 21 (1995).
- Wessel Jane**, "A Tribunal by Any Other Name: US Discovery in Aid of Non-US Arbitration", 8 *Int.ALR* 139 (2005).
- Wesseling Rein**, "The Commission Notices on Decentralisation of EC Antitrust Law: In for a Penny, Not for a Pound", 18 *ECLR* 94 (1997).
- Wesseling Rein**, "The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options", 20 *ECLR* 420 (1999).
- Wesseling Rein**, *The Modernisation of EC Antitrust Law* (Oxford/Portland, 2000).
- Weyer Hartmut**, "Gemeinschaftsrechtliches Verbot und nationale Zivilrechtsfolgen - Eine Untersuchung am Beispiel der Artikel 81, 82 EG-Vertrag", 7 *ZEuP* 424 (1999).
- Weyer Hartmut**, "Gemeinschaftsrechtliche Vorgaben für das nationale Zivilverfahren: Verpflichtung der nationalen Zivilgerichte zur Anwendung der Art. 81, 82 EGV", 35 *EuR* 145 (2000).
- Weyer Hartmut**, "Nach der Reform: Gestaltung der Wettbewerbspolitik durch die Kommission? Zur Anwendung des Art. 81 EGV durch Kommission, nationale Gerichte und EuGH in einem System der gesetzlichen Ausnahme", 164 *ZHR* 611 (2000).
- Wezenbeek-Geuke Rita**, "Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, Particularly when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from the Netherlands", *LIDC Questions 2001/2002*, in: <http://www.ligue.org>.
- Wezenbeek Rita**, "Consumers and Competition Policy: The Commission's Perspective and the Example of Transport", 17 *EBLR* 73 (2006).
- Whish Richard and Sufrin Brenda**, "Article 85 and the Rule of Reason", 7 *YEL* 1 (1987).

- Whish Richard, "The Enforcement of EC Competition Law in the Domestic Courts of Member States", 15 ECLR 60 (1994).
- Whish Richard, "The Enforcement of EC Competition Law in the Domestic Courts of Member States", in: Gormley (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997).
- Whish Richard and Sufrin Brenda, "Community Competition Law: Notification and Individual Exemption - Goodbye to All That", in: Hayton (Ed.), *Law's Future(s)* (Oxford/Portland, 2000).
- Whish Richard, "Regulation 2790/99: The Commission's 'New Style' Block Exemption for Vertical Agreements", 37 CMLRev. 887 (2000).
- Whish Richard, *Competition Law* (London, 2003).
- Wilks Stephen and McGowan Lee, "Competition Policy in the European Union: Creating a Federal Agency?", in: Doern & Wilks (Eds.), *Comparative Competition Policy, National Institutions in a Global Market* (Oxford, 1996).
- Wils P.J. Wouter, "Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis", 24 ELRev. 139 (1999).
- Wils P.J. Wouter, "The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17", in: Hawk (Ed.), *International Antitrust Law and Policy 2000, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2001).
- Wils P.J. Wouter, *The Optimal Enforcement of EC Antitrust Law, Essays in Law & Economics* (The Hague/London/New York, 2002).
- Wils P.J. Wouter, "Should Private Antitrust Enforcement Be Encouraged in Europe?", 26 *World Competition* 473 (2003).
- Wils P.J. Wouter, "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003", 29 *World Competition* 345 (2006).
- Winckler Antoine, "Remedies Available under French Law in the Application of EC Competition Rules", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).
- Winterstein Alexander, "A Community Right in Damages for Breach of EC Competition Rules?", 16 ECLR 49 (1995).
- Wirtz M. Markus, "Anwendbarkeit von § 20 GWB auf selektive Vertriebssysteme nach Inkrafttreten der VO 1/2003", 53 WuW 1039 (2003).
- Wißmann Tim, "Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999", 23(2) *World Competition* 123 (2000).
- Wittwer Alexander, "Die EuGH-Rechtsprechung zum Europäischen Zivilprozessrecht aus den Jahren 2003 und 2004", 13 ZEuP 868 (2005).
- Wolf Dieter, "Entwicklungstendenzen im Verhältnis des nationalen zum europäischen Wettbewerbsrecht", in: *Schwerpunkte des Kartellrechts 1997, Referate des 25. FIW-Seminars* (Köln/Berlin/Bonn/München, 1998).
- Wolf Dieter, "Comment on the White Paper on the Reform of EC Competition Law", in: Hawk (Ed.), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2000).
- Woods Lorna, *Free Movement of Goods and Services within the European Community* (Aldershot/Burlington, 2004).
- Wurmnest Wolfgang, "Recognition and Enforcement of US Money Judgments in Germany", 23 Berkeley JInt'lL 175 (2005).
- Yannakopoulos Th. Konstantinos, *The Opacity Required by the Effective Competition in EC Public Procurement Law* (Athens/Komotini, 2003) [in Greek].

Yeung Karen, "Private Enforcement of Competition Law", in: McCrudden (Ed.), *Regulation and Deregulation, Policy and Practice in the Utilities and Financial Services Industries* (Oxford, 1999).

Zekoll Joachim, "European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective", 24 *Vand.JTransnat'IL* 75 (1991).

Zekoll Joachim and Rahlf Nils, "US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public", 54 *JZ* 384 (1999).

Zobel Petra, *Schiedsgerichtsbarkeit und Gemeinschaftsrecht, Im Spannungsverhältnis zwischen Integration und Exklusion* (Tübingen, 2005).

Zuleeg Manfred, "Die Wirksamkeit des Europarechts", in: Colneric, Edward *et al.* (Eds.), *Une Communauté de droit, Festschrift für Gil Carlos Rodriguez Iglesias* (Berlin, 2003).

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

